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Rethinking Standards of Appellate Review

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Every appellate decision typically begins with the standard of appellate review. The Supreme Court has shown considerable interest in selecting the standard of appellate review for particular issues, frequently granting certiorari in order to decide whether de novo or deferential review governs certain trial court rulings. This Article critiques the Court's framework for making this choice and questions the desirability of assigning distinct standards of appellate review on an issue-by-issue basis. Rather, the core functions of appellate courts are better served by a single template for review that dispenses with the recurring uncertainty over which standard governs which trial court decisions.

The error-correction role of appellate courts would be optimized by a unified inquiry into whether the appellate court's likelihood of reaching the correct decision is higher than the trial court's. This new standard would consider both general institutional advantages (such as the trial court's superior ability to assess witness credibility) and case-specific indicia of correctness (such as the appellate court's level of confidence or particular strengths or weaknesses in the trial court's analysis). This inquiry can be joined with the Supreme Court's long-standing view that appellate courts may always correct legal errors de novo, regardless of the broader standard of review that applies to a particular issue. That power to correct legal errors, combined with the ability to identify conditions that increase or decrease the likelihood that a court's decision on a particular issue is correct, would enhance the law-clarification function of appellate decisions.

Accordingly, this Article argues for a uniform approach to appellate review that permits reversal only when (a) the trial court committed an error of law, or (b) the appellate court's likelihood of reaching the correct decision is higher than the trial court's. These two components eliminate the need to track particular issues for either de novo or deferential review at the front end, allowing appellate courts to discard the Supreme Court's problematic doctrine on standard-of-review selection while still serving the systemic goals of error correction and law clarification.

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INTRODUCTION

When appellate courts issue decisions, their analysis usually begins with the standard of appellate review.[1] Briefs filed in the federal courts of appeals must

1. For a sampling of published appellate decisions from the first weeks of 2020, see, e.g., Paez v. Sec'y, Fla. Dep't of Corr., 947 F.3d 649, 651 (11th Cir. 2020) ("We review a district court's decision to take judicial notice of a fact for abuse of discretion. We also review a district court's decision to *sua sponte* raise the statute of limitations for abuse of discretion." (citation omitted)); Murphy-Sims v. Owners Ins. Co., 947 F.3d 628, 631 (10th Cir. 2020) ("Where an appellant challenges a particular jury instruction, we review the district court's decision to include or exclude that instruction for abuse of discretion."); L.F. v. Lake Wash. Sch. Dist. #414, 947 F.3d 621, 625 (9th Cir. 2020) ("A grant of summary judgment is reviewed de novo."); Taha v. Int'l Bhd. of Teamsters, Local 781, 947 F.3d 464, 469 (7th Cir. 2020) ("The dismissal of a complaint under Rule 12(b)(6) warrants de novo review."); BP Expl. & Prod., Inc. v. Claimant ID 100354107, 947 F.3d 295, 298 (5th Cir. 2020) ("This court applies an abuse-of-discretion standard to the district court's refusal to review a final award under the Settlement Program."); Wojcicki v. SCANA/SCE&G, 947 F.3d 240, 246 (4th Cir. 2020) ("We review the denial of a motion for reconsideration under the deferential abuse of discretion standard."); Roe v. Dep't of Def., 947 F.3d 207, 219 (4th Cir. 2020) ("We review the decision to grant or deny a preliminary injunction for an abuse of discretion."); Grand Canyon Tr. v. Bernhardt, 947 F.3d 94, 95 (D.C. Cir. 2020) ("We begin our analysis by resolving the parties' dispute over our standard of review . . . . The agencies' view is that the question of causation is reviewed only for clear error. The agencies are correct.") Hobbs v. Petroplex Pipe & Constr., Inc., 946 F.3d 824, 829 (5th Cir. 2020) ("Because the district court resolved this case following a bench trial, we review the district court's historical findings of fact for clear error."). *See generally* HARRY T. EDWARDS, LINDA A. ELLIOTT & MARIN K. LEVY, FEDERAL STANDARDS OF REVIEW, at x (2d ed. 2013) (describing standards of appellate review as "critically important in determining the parameters of appellate review and in allocating authority between trial courts . . . and the appellate bench").

contain "a concise statement of the applicable standard of review."[2] Frequently, however, there is no statute or rule that dictates the standard of appellate review for the myriad issues that appellate courts must address. In such cases, federal courts determine the standard of review on their own.

Often the Supreme Court itself grants certiorari for the express purpose of determining the standard of appellate review for particular issues.[3] The Court has been called upon to decide the standard of review for issues such as whether to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure;[4] whether an officer had reasonable suspicion or probable cause for purposes of the Fourth Amendment;[5] whether to enforce a subpoena from the Equal Employment Opportunity Commission;[6] whether to order a new trial or remittitur based on an excessive punitive-damages award;[7] whether a punitive damage award is grossly excessive for purposes of the Due Process Clause;[8] whether the forfeiture of property to the government is grossly disproportional under the Excessive Fines Clause;[9] whether to award attorney fees under section 285 of the Patent Act;[10] whether a creditor is a non-statutory insider for purposes of the Bankruptcy Code;[11] whether a federal right was clearly established for purposes of qualified immunity;[12] where a child's "habitual residence" is for purposes of the Hague Convention on the Civil Aspects of International Child Abduction;[13] whether to award enhanced damages in a patent case;[14] determinations of state law questions in a diversity action;[15] whether the government's litigation position was substantially justified for purposes of awarding a plaintiff attorney fees under the Equal Access to Justice Act;[16] and factual disputes relating to construction of a patent claim.[17] Once selected, that standard governs both circuit-level appellate courts and the Supreme Court.[18]

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2. FED. R. APP. P. 28(a)(8)(B); *see also id.* 28(b)(4) (requiring every appellee's brief to provide a "statement of the standard of review" if "the appellee is dissatisfied with the appellant's statement").

3. *See infra* notes 4–17 and accompanying text.

4. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403–05 (1990).

5. Ornelas v. United States, 517 U.S. 690, 695–700 (1996).

6. McLane Co. v. EEOC, 137 S. Ct. 1159, 1166–70 (2017).

7. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279–80 (1989).

8. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431–40 (2001).

9. United States v. Bajakajian, 524 U.S. 321, 336–37 & n.10 (1998).

10. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563–64 (2014).

11. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 965–68 (2018).

12. Elder v. Holloway, 510 U.S. 510, 516 (1994).

13. Monasky v. Taglieri, 140 S. Ct. 719, 730–31 (2020).

14. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934–36 (2016).

15. Salve Regina Coll. v. Russell, 499 U.S. 225, 231–39 (1991).

16. Pierce v. Underwood, 487 U.S. 552, 557–63 (1988).

17. Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 836–40 (2015).

18. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001) (holding that a de novo standard of review applies to whether a punitive damage award is grossly excessive for purposes of the Due Process Clause); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (applying the de novo standard); *see also* Cooper v.

Through this line of decisions, the Supreme Court has identified a range of considerations for deciding whether federal appellate courts should apply a de novo standard (plenary review) or a deferential standard (such as clear error or abuse of discretion) to particular trial court rulings.[19] Although scholars have examined and critiqued certain features of existing doctrine on standards of appellate review,[20] they have not challenged the basic factors that ostensibly guide the selection of the standard of review for particular issues. This Article critically examines those factors and argues against selecting standards of review on an issue-by-issue basis.

One misguided feature of the Supreme Court's current approach is its view that the standard of appellate review should be selected based on the ability of an appellate decision to clarify the law on a given issue. Indeed, the Court has given contradictory instructions about the relationship between the standard of appellate

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Harris, 137 S. Ct. 1455, 1465 (2017) (applying a clear error standard of review to the district court's finding that race was the predominant factor in the drawing of two legislative districts in North Carolina).

19. To be clear, this Article's focus is the standard of review that appellate courts apply to trial court rulings. This standard of *appellate* review is distinct from standards that govern judicial review of acts by legislatures, *see, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 459 (1988) (noting "strict scrutiny," "heightened scrutiny," and "the standard rational relation test" as potential "standard[s] of review" for legislative classifications), or administrative agencies, *see, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) (describing the Administrative Procedure Act's "arbitrary and capricious standard" as a "deferential" and "narrow" standard of review (citations omitted)); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 58 (2011) (describing *Chevron* deference as "the appropriate standard of review" for certain agency actions).

20. *See, e.g.*, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14 (1992); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1 (2008); Randolph N. Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond* Joiner *and* Scheffer, 32 U.C. DAVIS L. REV. 289, 340 (1999); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 251 (1991); Martin B. Louis, *Discretion or Law: Appellate Review of Determinations That Rule 11 Has Been Violated or That Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733 (1990); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986); Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87 (2016); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308 (2009); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998); Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251 (2016); Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 757 (2006); Note, *Mixed Questions of Law and Fact*, 110 HARV. L. REV. 317 (1996).

review and law clarification. Some decisions indicate that an issue should be reviewed de novo if it "entails primarily legal . . . work"—that is, if it will "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard";[21] by contrast, deferential review should be selected for an issue that will hinge on "multifarious, fleeting, special, narrow facts that utterly resist generalization,"[22] and for which it is "impracticab[le] [to] formulat[e] a rule of decision."[23] In other contexts, however, the Court has stated that de novo review is necessary to clarify the law precisely *because* an issue is "not readily, or even usefully, reduced to a neat set of legal rules."[24]

This tension may reflect the reality that the standard of appellate review does not meaningfully affect the law-clarifying benefits of an appellate decision. The Supreme Court has consistently emphasized that appellate courts may correct legal errors de novo even when they are applying a deferential standard of review to a particular issue.[25] In this sense, an appellate court's ability to clarify the law in a given area is not restrained at all by the selection of a deferential standard of review for that issue; nor is it especially empowered by the selection of a de novo standard of review for that issue.[26] What ultimately makes a difference from a law-clarification standpoint is not the standard of appellate review but rather how the appellate court writes its opinion.[27]

The Supreme Court's current framework does recognize one important consideration. In inquiring whether the trial court or the appellate court is "better positioned" to decide a given issue,[28] it indicates that the standard of appellate review should be chosen with an eye toward reducing the systemic likelihood of error. But the current approach fails to explore fully the relationship between the standard of review and the error-correction function. On one hand, de novo review might best accomplish this goal, since it would maximize the ability of appellate courts to correct trial court mistakes. On the other hand, vesting de novo review in a worse-positioned appellate court could increase the likelihood that the appellate court would mistakenly reverse a correct trial court decision. Deferential review might address this latter concern, but the Court has failed to provide meaningful guidance on how deferential appellate review should operate in practice[29]—raising questions about whether it strikes the proper balance.

The considerations that currently drive the choice between deferential and de novo review are better served by a unified template for appellate review: for any

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21. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

22. *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)).

23. Rita v. United States, 551 U.S. 338, 363 (2007) (Stevens, J., concurring) (citing *Pierce*, 487 U.S. at 561–62).

24. Ornelas v. United States, 517 U.S. 690, 695–96 (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

25. *See infra* notes 50–51 and accompanying text.

26. *See infra* notes 82–86 and accompanying text.

27. *See infra* notes 87–96 and accompanying text.

28. McLane Co. v. EEOC, 137 S. Ct. 1159, 1166–67 (quoting *Pierce*, 487 U.S. at 559–60).

29. *See infra* notes 122–26 and accompanying text.

given appeal, the appellate court should inquire whether its likelihood of reaching the correct decision is higher than the trial court's likelihood of reaching the correct decision.[30] This inquiry would incorporate both (1) general institutional advantages—for example, the trial court's superior ability to assess witness credibility—and (2) case-specific indicia of correctness—such as the appellate court's level of confidence or particular strengths or weaknesses in the trial court's analysis.[31] This Article's approach would also retain the prevailing notion that appellate courts may correct all *legal* errors de novo.[32] But absent an identifiable legal error by the trial court, an appellate court should review trial court decisions through the lens of this comparative-likelihood-of-correctness standard.[33]

This approach will enhance both the error-correction and law-clarification functions that appellate courts serve.[34] Regarding the former, it is unproductive to slot issues for deferential or de novo review at the front end—based on whether trial courts are "better positioned" than appellate courts to decide a particular issue as a general matter—because the way to optimize systemic accuracy is via the more targeted, back-end question of whether the appellate court or the trial court is more likely to be correct *in this particular case*.[35] That inquiry will necessarily take into account any general advantages or disadvantages each court may have.

This Article's approach will also empower and encourage appellate courts to clarify the law. Appellate courts may continue to address questions of law de novo. But even beyond such legal issues, this Article's unified standard will require appellate courts to identify conditions that increase or decrease the likelihood that a court's decision on a particular issue is correct.[36] These would include the generalized institutional characteristics that currently inform the selection of the standard of review for particular issues, as well as case-specific features of a particular decision that either increase or decrease the likelihood of correctness.[37] Moreover, this Article's approach would incentivize more thorough decisions by trial courts, because the standard provides a tangible benefit for trial judges who render decisions in ways that exhibit a high likelihood of correctness.[38] For both trial courts and appellate courts, therefore, this approach to appellate review would play a valuable information-forcing role.[39]

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30. *See infra* Part II.

31. As explained *infra* notes 141–44 and accompanying text, this approach would not require the appellate court to calculate with mathematical precision the accuracy rates of it and the trial court. Rather, it provides a framework for conceptualizing considerations that already inform appellate review.

32. *See infra* note 147 and accompanying text; *see also infra* Part IV (proposing a more precise understanding of which legal issues would be categorically subject to de novo review).

33. *See infra* Part III.

34. *See* DANIEL JOHN MEADOR, APPELLATE COURTS IN THE UNITED STATES 3 (2d ed. 2006) ("Error correcting and lawmaking are the core appellate functions.").

35. *See infra* Section III.A.

36. *See infra* notes 152–54 and accompanying text.

37. *See infra* notes 148–51 and accompanying text.

38. *See infra* notes 156–58 and accompanying text.

39. *See infra* note 159 and accompanying text.

This Article also develops a sensible definition of what constitutes the kind of legal error that appellate courts may always address de novo (under both this Article's proposal and the Supreme Court's current approach).[40] Distinguishing pure "legal" issues from other matters is a problem that has bedeviled courts and commentators in a variety of different contexts.[41] This Article argues that the legal-error exception should apply only with respect to *generalizable* legal principles. This notion can be workably defined as propositions that can be expressed in the form "If *A* then *B*."[42] At some point, of course, the appellate court will run out of such generalizable principles; the outcome will hinge simply on whether *A* or Not-*A* is correct. As to that decision, systemic accuracy is maximized by allowing the appellate court to reverse the trial court only when its likelihood of being correct exceeds that of the trial court.[43] Accordingly, an appellate court would never have de novo authority to reverse the trial court solely because it disagrees with the trial court's decision. The appellate court must either identify a generalizable principle that was overlooked by the trial court, or it must explain why it is more likely to be correct than the trial court in that case.

To propose a unified approach to appellate review is not to suggest that the considerations underlying existing standards of appellate review are unimportant. Rather, these concerns are *too* important to be relegated to the sort of abstract, threshold inquiry that the current approach requires. The existing framework misguidedly tries to address the key appellate functions of law clarification and error correction by tracking issues for either de novo or deferential review at the front end. A better approach is to make these considerations part of a unified approach to appellate review that informs the substantive merits of every appellate decision.

This Article concludes, however, by addressing areas where the Supreme Court has suggested a specialized approach to appellate review. Specifically, the Court has indicated that certain trial court rulings that typically arise in constitutional litigation may warrant de novo review regardless of the functional considerations that dominate its general approach to standards of appellate review.[44] Although the Court has yet to clarify the scope of or justification for such distinctive treatment, this Article considers one possible rationale: that the *costs* of error may be asymmetric for some issues. Perhaps the erroneous *rejection* of a constitutional claim or defense (the *under*-enforcement of constitutional rights) is a more costly error than the erroneous *grant* of a constitutional claim or defense (the *over*-enforcement of constitutional rights).[45] The Supreme Court has yet to consider this possibility, and concern about asymmetric error costs does not currently form any part of the Court's general approach to selecting the standard of appellate review for particular issues. Although this Article does not comprehensively examine the problem of asymmetric error costs, it identifies several ways to account for such asymmetries within the context of the unified approach proposed here.[46]

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40. *See infra* Part IV.
41. *See infra* note 199.
42. *See infra* notes 200–13 and accompanying text.
43. *See infra* note 218 and accompanying text.
44. *See infra* Section V.A.
45. *See infra* notes 251–62 and accompanying text.
46. *See infra* notes 263–66 and accompanying text.

This Article proceeds as follows: Part I summarizes and criticizes the Supreme Court's current approach to selecting the standard of appellate review for particular issues. Part II develops a model to assess the relationship between the standard of review and the judicial system's ability to avoid errors, showing how appellate review can be deployed to improve systemic accuracy even as to issues for which the trial court has a higher general likelihood of correctness than the appellate court. Part III uses this insight to develop a unified approach to appellate review that does not require tracking particular issues for either de novo or deferential review at the front end. Part IV proposes a way to refine the "legal error exception"—the rule that legal questions may always be reviewed de novo—that will avoid overuse by opportunistic appellate courts. Part V addresses the current confusion regarding appellate review of certain issues relating to constitutional claims and defenses, and examines the possibility of specialized approaches to appellate review for issues where the costs of error are asymmetric.

I. WHY DOES THE STANDARD OF APPELLATE REVIEW MATTER?

Over the last several decades, the Supreme Court has issued a long line of decisions on how to select the standard of appellate review for particular issues.[47] Although there are a range of different "verbal formulas" for various standards of review,[48] the most important distinction is between de novo review (plenary or independent review) and deferential review (such as a clear-error or abuse-of-discretion standard).[49] Even when a deferential standard is chosen for a particular issue, the appellate court may correct any errors of law independently, without deference as to those legal issues.[50] Accordingly, the selection between de novo

47. *See supra* notes 4–17 and accompanying text.

48. United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (Posner, J.) ("[T]here are more verbal formulas for the scope of appellate review . . . than there are distinctions actually capable of being drawn in the practice of appellate review.").

49. *See* Sch. Dist. of Wis. Dells v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (Posner, J.) ("[T]he cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review."); *see also Boyd*, 55 F.3d at 242 (noting that the distinction between de novo review and deferential review "is a feasible, intelligible, and important one"); Oldfather, *supra* note 20, at 313–14 (describing the distinction between de novo review and "more limited standards of review, such as for abuse of discretion, where the reviewing court's role is restricted to determining whether the lower court's ruling fell within some zone of permissibility"). *But cf.* Monasky v. Taglieri, 140 S. Ct. 719, 735 (2020) (Alito, J., concurring) (arguing that a district court's determination of a child's "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction should be reviewed for "abuse of discretion" rather than the majority's standard of "clear error" but recognizing that "[a]s a practical matter, the difference may be no more than minimal"); KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW 43–44 (2013) (suggesting three standards—de novo review, clear-error review, and an especially heightened level of deference requiring "almost-certain error").

50. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 968 n.7 (2018) (adopting a clear-error standard of review but noting that "an appellate court must correct any legal error infecting a [lower] court's decision" and that an

review and deferential review matters only with respect to errors that are not *legal* errors.[51]

In the mid-1980s, the Supreme Court began to embrace a functional, policy-oriented approach to choosing the standard of appellate review for particular issues.[52] Its analysis has focused on two of the key roles that appellate courts play. The first is law clarification.[53] The second is error correction.[54]

These functional considerations are not necessarily the entire picture. The Court has at times indicated that historical practice might suggest a particular standard of appellate review for a particular issue.[55] And it is possible that positive-law rules, statutes, or even constitutional provisions will dictate—or at least provide textual clues about[56]—the intended standard of review. Federal Civil Rule 52, for example, states that a district court's "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous."[57] With respect to jury trials, the Supreme Court has held that the Seventh Amendment "controls the allocation of authority to review verdicts" between trial courts and appellate courts,[58] holding that the Seventh Amendment required a deferential standard of appellate review when a trial court denies a motion for a new trial based on an ostensibly excessive verdict.[59] Even when the Court has undertaken such inquiries, however, it has often found

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appellate court "should apply de novo review" to such a legal error); McLane Co. v. EEOC, 137 S. Ct. 1159, 1168 n.3 (2017) (noting that an abuse-of-discretion standard "does not shelter a district court that makes an error of law"); Koon v. United States, 518 U.S. 81, 100 (1996) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law."); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) (noting that an abuse-of-discretion standard "would not preclude the appellate court's correction of a district court's legal errors"); *see also* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) ("[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 448 (2001) (Ginsburg, J., dissenting) ("[T]o the extent the inquiry is 'legal' in character, there is little difference between review de novo and review for abuse of discretion."). For a critique of the notion that legal errors should be categorically subject to de novo review, see Oldfather, *supra* note 20, at 310–11.

51. Because the treatment of legal errors is the same regardless of the selected standard of review, what qualifies as a "legal error" is not the primary focus of this Article. And as explained in Part III, this Article's proposal would retain the current rule that legal errors are reviewed de novo on appeal. In Part IV, however, I propose one way to define and implement the legal-error exception.

52. *See* Pierce v. Underwood, 487 U.S. 552, 559–63 (1988) (selecting a deferential standard of appellate review based on what "sound judicial administration counsels"); *see also, e.g.*, *McLane*, 137 S. Ct. at 1168–69 (discussing "functional considerations" and "functional concerns" that favored an abuse-of-discretion standard for reviewing a district court's decision to enforce an EEOC subpoena).

53. *See infra* notes 73–79 and accompanying text.

54. *See infra* notes 108–09 and accompanying text.

55. *See McLane*, 137 S. Ct. at 1166.

56. *See, e.g.*, Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 564 (2014).

57. FED. R. CIV. P. 52(a)(6).

58. Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996).

59. *Id.* at 435 (holding that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment").

either that they provide no independent guidance,[60] or that such inquiries merely bolster the Court's policy-based assessment of the relevant functional considerations.[61]

The Supreme Court's recent decision in *U.S. Bank* has refined the inquiry somewhat.[62] Justice Kagan's opinion distinguished between three components of any given lower court ruling: "the first purely legal, the next purely factual, the last a combination of the other two."[63] The first of these—the "legal test" or the "standard" that governs a particular issue—is an "unalloyed legal . . . question[]" that an appellate court reviews de novo, "without the slightest deference."[64] In the second category are questions of "'basic' or 'historical' fact," which address "who did what, when or where, how or why."[65] Such purely factual questions are subject to deferential review.[66] The final component is "the so-called 'mixed question' of law and fact"—that is, "whether the historical facts found satisfy the legal test chosen."[67] It is for such "mixed questions" that functional considerations come into play.[68]

This Part critically examines the extent to which the selection of the standard of appellate review affects the functional considerations the Supreme Court has identified. As explained below, the Court's approach does not fully appreciate the relationship between the standard of review and the ability of appellate courts to clarify the law.[69] There is a plausible connection between error correction and the standard of appellate review, but that relationship demands a fuller account than the Court has provided.[70]

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60. *See, e.g.*, U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. At Lakeridge, LLC, 138 S. Ct. 960, 967 n.3 (2018).

61. *See, e.g.*, *Highmark*, 572 U.S. at 564.

62. *U.S. Bank*, 138 S. Ct. at 965–68.

63. *Id.* at 965.

64. *Id.*

65. *Id.* at 966. *See also* Monaghan, *supra* note 20, at 235 (describing "[f]act identification" as "a case-specific inquiry into what happened here" including "who, when, what, and where" (emphasis omitted)).

66. *See U.S. Bank*, 138 S. Ct. at 966 ("By well-settled rule, such factual findings are reviewable only for clear error—in other words, with a serious thumb on the scale for the [lower] court." (citing FED. R. CIV. P. 52(a)(6)).

67. *Id.*

68. *Id.* at 966–67. This framing does not meaningfully affect the overall approach described here. Because of the legal-error exception discussed above, questions of law relevant to any particular issue must be reviewed de novo, even when a deferential standard is selected for that issue. *See supra* notes 50–51 and accompanying text. And none of the issues to which the Supreme Court has applied its standard-of-review selection framework constitute questions of "historical fact." *See supra* notes 4–17 and accompanying text (summarizing issues for which the Supreme Court has designated a particular standard of appellate review); *cf. infra* notes 222–45 and accompanying text (describing the current confusion regarding "constitutional facts" and "legislative facts," which the Court has yet to examine through the lens of its current framework). As a practical matter, then, it makes no difference whether an issue is first characterized as a mixed question before inquiring into which standard of appellate review should apply as a matter of judicial policy.

69. *See infra* Section I.A.

70. *See infra* Section I.B.

A. Law Clarification

An important role that appellate courts play in our system is to clarify the substantive content of the law through their decisions in particular cases.[71] As Professor Philip Kurland put it nearly half a century ago, this "lawmaking function" is "the genius of the common law system that we inherited from our English forbears."[72] The Supreme Court has stated that the choice of the standard of review for any given issue should consider the appellate court's law-clarification role. But it has provided conflicting accounts of the relationship between the standard of appellate review and law clarification.

One strand of case law instructs that choosing the standard of review should depend on whether the appellate court's resolution of the issue "entails primarily legal or factual work."[73] A question that will "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" should typically be reviewed de novo.[74] But a deferential standard should apply to questions that will "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[75] The "impracticability of formulating a rule of decision" for such an issue is a significant factor in favor of deferential appellate review.[76]

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71. *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69–70 (1985) (noting "the law-making function of an intermediate appellate court"); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 894 (1983) (noting that courts of appeals "are also charged with . . . contributing to the explication of federal law"); Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (describing appellate courts' "lawmaking function of creating and amending rules of law, not only so that they may be followed by the lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies"); Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779 (1957) ("Everyone agrees, so far as I know, that one function of an appellate court is to discover and declare—or to make—the law.").

72. Kurland, *supra* note 71, at 618; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

73. *U.S. Bank*, 138 S. Ct. at 967; *see also id.* (noting that de novo review should apply "when applying the law involves developing auxiliary legal principles of use in other cases"); Monasky v. Taglieri, 140 S. Ct. 719, 730 ("[T]he appropriate standard of appellate review for a mixed question depends on whether answering it entails primarily legal or factual work." (quoting *U.S. Bank*, 138 S. Ct. at 967) (ellipses and internal quotation marks omitted)).

74. *U.S. Bank*, 138 S. Ct. at 967.

75. *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)); *see also Pierce*, 487 U.S. at 561–62 (quoting Rosenberg, *supra* note 20, at 662–63).

76. *Pierce*, 487 U.S. at 561 ("One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue." (quoting Rosenberg, *supra* note 20, at 662)); Rita v. United States, 551 U.S. 338, 363 (2007)

Another line of Supreme Court decisions suggests a different relationship between standards of appellate review and law clarification. It posits that de novo review might be needed to clarify the law in exactly those situations where a particular issue is "not readily, or even usefully, reduced to a neat set of legal rules."[77] Some concepts "cannot be articulated with precision" and therefore "take their substantive content from the particular contexts in which the standards are being assessed."[78] Nondeferential review may be required so that appellate courts can "maintain control of, and clarify, the legal principles."[79]

These two visions are irreconcilable. If one accepts the view that case-by-case, de novo appellate adjudication clarifies the law for issues that are "not readily, or even usefully, reduced to a neat set of legal rules,"[80] surely one should also welcome such clarification in the face of "multifarious, fleeting, special, narrow facts that utterly resist generalization."[81] The reality, however, is that the standard of appellate review does not change the court's capacity to clarify the law. As described above, legal errors warrant appellate correction even under a deferential standard of review.[82] Accordingly, a deferential standard would not restrict an appellate court's ability to "expound on the law, particularly by amplifying or elaborating on a broad legal standard."[83] Where a trial court decision is contrary to law—as that law is independently identified by the appellate court—reversal is permitted even under deferential review.

Nor can it be presumed that only de novo review is capable of providing case-by-case legal clarification. In one recent case, the Supreme Court held that the trial court's decision to award enhanced damages in a patent case must be reviewed for abuse of discretion.[84] The Court did not view deferential review as an obstacle to clarifying when such enhanced damages were appropriate. To the contrary, the Court praised the fact that appellate review under a deferential standard had "narrowed" the "channel of discretion"[85] and had "given substance to the notion that there are limits to that discretion."[86] Even under deferential review, the appellate court must determine the metes and bounds of the space within which trial courts may operate.

(Stevens, J., concurring) ("A second factor that we found significant was the impracticability of formulating a rule of decision . . . ."); *see also* McLane Co. v. EEOC, 137 S. Ct. 1159, 1167 (noting that the decision whether to enforce an EEOC subpoena is "case-specific" and does not turn "on a neat set of legal rules" (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

77. Ornelas v. United States, 517 U.S. 690, 695–96 (1996) (quoting *Gates*, 462 U.S. at 232).

78. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (quoting *Ornelas*, 517 U.S. at 696).

79. *Id.* (quoting *Ornelas*, 517 U.S. at 697). This notion also seems to inform the Supreme Court's admittedly inconsistent treatment of certain constitutional issues. *See infra* notes 219–31 and accompanying text.

80. *Ornelas*, 517 U.S. at 695–96.

81. *U.S. Bank*, 138 S. Ct. at 967 (quoting *Pierce*, 487 U.S. at 561–62); *see supra* note 75 and accompanying text.

82. *See supra* notes 50–51 and accompanying text.

83. *U.S. Bank*, 138 S. Ct. at 967.

84. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934 (2016).

85. *Id.* at 1932 (quoting Friendly, *supra* note 20, at 772).

86. *Id.* at 1934.

Whether the appellate court ultimately approves or disapproves of a particular trial court decision, it can shed light on what is legally permissible going forward.

In short, what makes a difference from a law-clarification standpoint is not the standard of appellate review but rather how the appellate court writes its opinion in any given case. An appellate court might choose to issue a summary decision with no substantive reasoning whatsoever.[87] Or it might issue an unpublished opinion that lacks precedential effect.[88] That such decisions are rendered under a de novo standard of review will not magically imbue such decisions with law-clarifying benefits.[89] This is not to suggest that appellate courts should be *obligated* to provide broad guidance beyond the precise facts of a particular case. Some commentators, for example, have extolled the virtues of "judicial minimalism,"[90] recognizing that maximalist decisions can impose heightened system costs in two ways. First, they entail additional "decision costs" because it takes greater effort to craft an opinion that will clarify what the law requires across a broader sweep of future cases.[91] Second, they risk additional "error costs," because a mistaken decision will adversely affect a larger universe of future cases.[92] There are, of course, arguments in favor of more maximalist appellate decision-making.[93] The point here is simply that a de novo standard of review does not by itself bring about law-clarifying appellate decisions.

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87. *See, e.g.*, Von Germeten v. Planet Home Lending, LLC, No. 19-2459, 2020 WL 469883, at *1 (7th Cir. Jan. 10, 2020); Grant v. U.S. Dep't of Def., No. 18-5308, 2019 WL 668086, at *1 (D.C. Cir. Jan. 25, 2019). Although such summary decisions are typically issued when appellate courts affirm the trial court's decision, there are some examples of summary reversals as well. *See, e.g.*, U.S. Dep't of Interior v. Fed. Lab. Rels. Auth., No. 91-1583, 1993 WL 71706 (D.C. Cir. Mar. 4, 1993) (granting summary reversal because "[t]he merits of the parties' positions are so clear as to warrant summary action").

88. *See, e.g.*, 2D CIR. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."); 7TH CIR. R. 32.1(b) (providing that decisions rendered as "Orders" are "not published in the Federal Reporter, and are not treated as precedents"); 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent . . . ."). *See generally* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 542–67 (2020) (describing the use of unpublished decisions in federal appellate courts). Appellate courts use unpublished opinions even when reversing a trial court decision. *See, e.g.*, McCalmont v. Fed. Nat'l Mortg. Ass'n, 677 F. App'x 331 (9th Cir. 2017) (reversing the district court in an unpublished memorandum opinion); Love v. WEECOO (TM), 774 F. App'x 519, 520–22 (11th Cir. 2019) (reversing the district court in an unpublished per curiam opinion).

89. *See, e.g.*, Meyer v. Pfeifle, 790 F. App'x 843, 843 (8th Cir. 2020) (issuing a nonprecedential, unpublished opinion while applying a de novo standard of review); Porter v. Uhler, 790 F. App'x 329, 329 (2d Cir. 2020) (same); Swallow v. Torngren, 789 F. App'x 610, 611 (9th Cir. 2020) (same); United States v. Smith, 798 F. App'x 473, 475 (11th Cir. 2020) (same).

90. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

91. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16–18 (1996).

92. *Id.* at 18–19.

93. *See, e.g.*, Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 3 (2009).

Conversely, a deferential standard of review will not hinder an appellate court that *is* prepared to "expound," "amplify[]," and "elaborat[e]" on the law.[94] Again, deferential review gives the appellate court free rein to correct errors that run afoul of the appellate court's understanding of the governing law.[95] And even if the appellate court does not explicitly invoke the exception that allows for de novo review of legal errors, it may still provide law-clarifying guidance in examining a trial court decision under a deferential standard.[96]

Finally, there is a fundamental conceptual flaw in the current framework's inquiry into law clarification. The court selecting the standard of appellate review must ultimately speculate about whether future decisions on a particular issue *will* "entail[] primarily legal . . . work"[97] (such as the development of a "neat set of legal rules"[98]) or, in the alternative, hinge on "multifarious, fleeting, special, narrow facts that utterly resist generalization."[99] Those questions are ones that an appellate court should address on the merits of any particular appeal—not as part of a hypothetical assessment of how future appellate courts will behave. The Court's recent *U.S. Bank* decision, for example, considered the standard of review for whether a transaction had been "conducted at arm's length" for purposes of federal bankruptcy law.[100] Concluding that a deferential clear-error standard should apply, the Court reasoned that applying the "arm's-length test"—that is, assessing whether the transaction had been "conducted as though the two parties were strangers"—would require "[p]recious little" legal work.[101] The Court observed that prior decisions "have never tried to elaborate on the established idea of a transaction conducted as between strangers."[102] Rather, "[t]he stock judicial method is merely to state the requirement of such a transaction and then to do the fact-intensive job of exploring whether, in a particular case, it occurred."[103] There was "no apparent need to further develop 'norms and criteria,' or to devise a supplemental multi part test, in order to apply the familiar term."[104]

The problem with this sort of analysis is that the overarching legal standards—the "norms and criteria," or the need for a "supplemental multi-part test"[105]—are questions that the appellate court should address on the merits. An issue may appear "fact-intensive" to the court that is selecting the standard of review, but a court considering the merits of future cases may believe that generalizable "norms and

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94. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

95. *See supra* notes 50–51 and accompanying text.

96. *See supra* notes 84–86 and accompanying text.

97. *U.S. Bank*, 138 S. Ct. at 967.

98. Ornelas v. United States, 517 U.S. 690, 695–96 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

99. *U.S. Bank*, 138 S. Ct. at 967 (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)).

100. *Id.* at 965.

101. *Id.* at 962, 967–69.

102. *Id.* at 968.

103. *Id.* (citing Comm'r v. Wemyss, 324 U.S. 303, 307 (1945)).

104. *Id.*

105. *Id.*

criteria" are warranted. Would that scenario require a retroactive change to the standard of review?[106] The Court's approach puts the cart before the horse by requiring courts to predict in the abstract whether more generalized rules are justified or desirable without considering the actual merits of such rules.

For all of these reasons, the current framework's examination of how the standard of review would affect the appellate court's capacity to clarify the law is misguided. Law clarification ultimately comes from the substance of an appellate court's opinion, which will either clarify—or not clarify—the law regardless of the standard of appellate review.

B. Error Correction

Perhaps the most direct function that appellate courts serve is to correct errors by trial courts.[107] For purposes of selecting the standard of appellate review, this error-correction role drives the Supreme Court's consideration of "[d]ifferences in the institutional competence of trial judges and appellate judges"[108] as to a particular issue; the choice should examine whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[109] Current case law, however, has yet to fully explore the relationship between the standard of appellate review for any given issue and error correction.

One might argue that de novo review would best serve the appellate courts' error-correction function, because a de novo standard would maximize the ability of appellate courts to correct trial court mistakes.[110] A deferential standard of review, by contrast, could require the appellate court to tolerate errors that might have been corrected under a de novo standard. A more complete understanding, however, must account for the possibility that the appellate court will make a mistake. If the appellate court mistakenly reverses a correct trial court decision, then appellate review has *created* error.

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106. To be clear, as explained *supra* notes 50–51 and accompanying text, an appellate court could declare such norms and criteria de novo even when a deferential standard of review governs a particular issue. But that only bolsters this Article's earlier point that the standard of appellate review does not affect a court's ability to clarify the law in such a way. *See supra* notes 94–96 and accompanying text.

107. *See, e.g.*, Dalton, *supra* note 71, at 69 ("Why do we have appeals in the first place? Among the more compelling answers to that question are that appellate courts exist to correct errors . . . ."); Edwards, *supra* note 71, at 894 ("The courts of appeals, unlike the Supreme Court, are intended to serve as courts of error . . . ."); Kurland, *supra* note 71, at 618 (noting that one function that appellate courts perform is "that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarchy").

108. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001).

109. McLane Co. v. EEOC, 137 S. Ct. 1159, 1166–67 (2017) (quoting Pierce v. Underwood, 487 U.S. 552, 559–60); *see also* DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 222 (2d ed. 2006) ("In some circumstances, it has been believed, the trial judge is in a better position to make a correct decision than are appellate judges even though there normally are three appellate judges and only one trial judge.").

110. *See, e.g.*, Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683, 1699 (2011) (noting the argument that "de novo review might correct more mistakes").

Indeed, there are some issues for which the trial court may be more likely to be correct than the appellate court. For example, the Supreme Court has emphasized that trial courts have an advantage when evaluating the credibility of live witness testimony because "the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record."[111] It has also observed that a trial court may be better positioned with respect to particularly complex disputes, because they are able to develop greater familiarity with the relevant issues while presiding over "the entirety of a proceeding," as compared to "an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred."[112] The Court has made a similar point regarding certain criminal sentencing decisions, noting that "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing."[113]

To illustrate this point more generally, consider a scenario where the trial court is 90% likely to be correct, but the appellate court is only 80% likely to be correct.[114] If no appeal is allowed, then the systemic likelihood of correctness is simply the trial court's likelihood of correctness (90%). If de novo review is allowed, then the appellate court will displace the trial court's ruling in those cases where they disagree. Accordingly, the aggregate likelihood of correctness will be the appellate court's likelihood (80%). The following table unpacks this model in more detail:

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111. Cooper v. Harris, 137 S. Ct. 1455, 1474 (2017) (quoting Anderson v. Bessemer City, 470 U.S. 564, 575 (1985)).

112. Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 327 (2015) (noting that patent law requires "familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience" and that "[a] district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred" (quoting Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 610 (1950))).

113. Koon v. United States, 518 U.S. 81, 98 (1996).

114. In developing this illustration, I am cognizant that using mathematical probabilities to assess accuracy in the legal system can be problematic. *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107 (2007); D. Michael Risinger, *Reservations About Likelihood Ratios (and Some Aspects of Forensic 'Bayesianism')*, 12 L., PROBABILITY & RISK 63 (2013). And I do not mean to suggest that one could measure with precision the likelihood that one court or another will reach the correct result, or that one could even know with confidence whether a "correct" result was reached in any given case. This model can, however, illuminate the practical consequences of appellate review under certain assumptions. *See also infra* Part II (modeling deferential appellate review).

Table 1: De Novo Review Despite the Appellate Court's Lower Likelihood of Correctness

	Trial court is correct (90%)	Trial court is incorrect (10%)
Appellate court is correct (80%)	*Box 1: Correct result* Appellate court affirms a correct trial court decision [72% of all cases][115]	*Box 2: Correct result* Appellate court reverses an incorrect trial court decision [8% of all cases]
Appellate court is incorrect (20%)	*Box 3: Incorrect result* Appellate court reverses a correct trial court decision [18% of all cases]	*Box 4: Incorrect result* Appellate court affirms an incorrect trial court decision [2% of all cases]

The aggregate likelihood of reaching the correct result in Table 1 is the sum of Box 1 (72% of all cases) and Box 2 (8% of all cases).[116] This is precisely the appellate court's likelihood of correctness (80%), which is a worse accuracy rate than the trial court standing alone (90%).[117] One can emphasize the point by focusing on Box 2 and Box 3—the two situations where the appellate court disagrees with the trial court. In the universe of cases where they disagree, the appellate court is wrong nearly 70% of the time.[118]

This admittedly simple model illustrates the intuitive notion that de novo review will *reduce* the likelihood of correctness in cases where the trial court is more likely to be correct than the appellate court. This insight justifies the current inquiry—as

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115. For ease of illustration, this model assumes that the trial and appellate court's accuracy rates in any given case are not correlated. Mathematically, this means that the likelihood of each outcome is simply the product of the component probabilities. For example, the likelihood that both courts reach the correct outcome (Box 1) is the product of the appellate court's likelihood of being correct and the trial court's likelihood of being correct (.90 x .80 = .72).

116. For another 2x2-grid depiction of the relationship between trial courts and appellate courts, see Dalton, *supra* note 71, at 76. Professor Dalton modeled party *satisfaction* in these four possible outcomes, arguing that the only outcome with positive party satisfaction is the appellate court correctly reversing an incorrect trial court decision. *See id.* The appellate court's affirmance of a correct trial court decision, he argued, was a negative outcome in terms of party satisfaction because, in that situation, the trial court had reached the correct result so an appeal was unnecessary. *See id.* at 77 ("If the trial judge has gotten it right, what advantage is there in an appeal?"). This is an important and valuable insight regarding the potential costs and benefits of a right to appellate review, but it addresses a different issue than systemic accuracy, which is the focus of this Article's model.

117. To be clear, the hypothetical accuracy rates of 90% and 80% are chosen purely for illustrative purposes. The same overall result—that de novo review reduces systemic accuracy when the trial court is more likely to be correct than the appellate court—obtains regardless of the exact numbers.

118. Boxes 2 and 3 represent 26% of all cases, with Box 2 (trial court correct) representing 18% of all cases and Box 3 (appellate court correct) representing 8% of all cases. The trial court is correct 69.2% of the time they disagree (.18 ÷ .26), and the appellate court is correct 30.8% of the time they disagree (.08 ÷ .26).

described above[119]—into the relative "institutional competence of trial judges and appellate judges"[120] and whether the trial court or the appellate court is "better positioned . . . to decide the issue in question."[121] For issues where the trial court has a greater likelihood of correctness than the appellate court, the error-correction function is not well served by a de novo standard of review.

Whether deferential review is a more desirable alternative, however, is less clear. On one hand, it might be argued that appellate review should be denied *entirely* for issues where the trial court has a greater likelihood of correctness; why would we ever want to displace the judgment of the more accurate institution? On the other hand, it could be argued that a deferential standard of review paints with too broad a brush, perhaps impeding appellate courts from correcting trial courts whose performance in a particular case does not match the prediction of greater accuracy that prompted the selection of a deferential standard to begin with.

It is hard to assess whether deferential review strikes the right balance because the Supreme Court has shed remarkably little light on what sort of *deference* deferential appellate review requires. Consider the "clearly erroneous" standard.[122] The Supreme Court has stated that clear-error review entails "a serious thumb on the scale" in favor of the lower court's decision[123]—reversal requires "the definite and firm conviction that a mistake has been committed."[124] But how heavy a "thumb" is required? How "definite and firm" must the conviction be? As Professor Ed Cooper put it: "[T]he 'clearly erroneous' phrase has no intrinsic meaning. It is elastic, capacious, malleable, and above all variable."[125] The same could be said of appellate

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119. *See supra* notes 108–09 and accompanying text.

120. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 440, 440 (2001).

121. McLane Co. v. EEOC, 137 S. Ct. 1159, 1166–67 (2017) (quoting Pierce v. Underwood, 487 U.S. 552, 559–60 (1988)).

122. *See, e.g.*, FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ."); U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt, LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 963 (2018) (holding that "a clear-error standard should apply" to the question of "whether the person's transactions with the debtor (or another of its insiders) were at arm's length").

123. *U.S. Bank*, 138 S. Ct. at 966; *see also* Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017) ("[W]e may not reverse just because we 'would have decided the [matter] differently.'" (alterations in original) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985))).

124. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); *see also* Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984) (calling *U.S. Gypsum* a "seminal decision" on the clear-error standard); *Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." (quoting *Anderson*, 470 U.S. at 574)). One federal judge offered the following gloss on clear-error review: "[A] decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

125. Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645 (1988); *see also* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW § 1.01 (4th ed. 2010) ("Carroll's Humpty Dumpty reveals what appellate specialists soon realize: word meaning often boils down to the fact of power and expertise rather than a theory of natural significance."

review for "abuse of discretion," which Judge Henry Friendly called a "verbal coat of many colors."[126] By what metric is an appellate court to measure what constitutes "abuse"?

Ultimately, one cannot assess in isolation the connection between the standard of appellate review and error correction. If one is depending on deferential review to limit the ability of appellate courts to substitute their judgment as to issues for which they are comparatively less accurate, more clarity is needed regarding precisely what sort of deference is required.

* * *

This Part reveals that two of the rationales the Supreme Court has identified for choosing between deferential and de novo review for any particular issue are misguided. The standard of appellate review bears only the most attenuated connection to law clarification. There is a plausible argument that the standard of review can affect the error-correction function—as discussed above, de novo review might undermine the goal of correcting error as to issues for which the trial court has a higher accuracy rate than the appellate court.[127] But the optimal approach to appellate review as to such issues is unclear. The next Part explores how a deferential standard of review might improve the systemic likelihood of reaching correct results, coming to the surprising conclusion that the optimal *application* of deferential appellate review supports a unified approach that does *not* demand an ex ante assessment of whether the trial court or the appellate court is relatively better positioned with respect to any given issue.

II. OPTIMIZING ERROR CORRECTION

Although there is a plausible connection between the standard of appellate review for a particular issue and the judicial system's effectiveness in correcting errors regarding that issue, the precise relationship between the standard of review and error correction has yet to be carefully explored. On one hand, issues for which the trial court may be "better positioned" to reach the correct result should require some deference by the appellate court. Otherwise, we risk a worse-positioned appellate court displacing the judgment of a better-positioned trial court. On the other hand, there remains uncertainty about how deferential review is supposed to operate, calling into question whether such deferential review reduces systemic error.[128]

(citing LEWIS CARROLL, THROUGH THE LOOKING-GLASS, Ch. VI (1872))); Borgmann, *supra* note 20, at 199–200 (noting that "[t]he Supreme Court has not provided detailed guidance as to what makes a finding 'clearly erroneous'" and that "[b]oth courts and commentators have criticized the 'clearly erroneous' standard as murky and malleable").

126. Friendly, *supra* note 20, at 763 (quoting United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting)); *see also* Rosenberg, *supra* note 20, at 659 (arguing that "the phrase 'abuse of discretion' . . . does nothing by way of offering reasons or guidance for the future" and "does not communicate meaning").

127. *See supra* Table 1, notes 114–18, and accompanying text.

128. *See supra* notes 122–26 and accompanying text.

This Part develops a model to better understand how deferential review can optimize systemic accuracy in cases where—as a general matter—the trial court is more likely to be correct than the appellate court. As explained below, the basic test should be that the appellate court should reverse where characteristics of the particular case on appeal override the institutional advantages the trial court might otherwise possess as a general matter. Such characteristics could include an especially high level of confidence by the appellate court (a "definite and firm conviction,"[129] as the Supreme Court has described in the context of clear-error review). They could also include problematic aspects of the trial court's reasoning that indicate a higher-than-usual likelihood of error by the trial court.[130]

This insight may seem straightforward, but it has a surprising corollary. If the key inquiry is the appellate court's and trial court's comparative likelihood of correctness in a particular case, then there is no need to slot issues for either deferential review or de novo review at the front end. Both the generalized institutional advantages that might inform the *selection* of the standard of appellate review and the case-specific factors that would affect the *application* of that standard of review can form a uniform template for appellate review.

Put another way, if the appellate court will have to weigh both its and the trial court's institutional and case-specific advantages when applying a deferential standard of review, what is gained by designating an issue for deferential review in the first instance? That comparative assessment is optimal from an error-correction standpoint regardless of whether—as a general matter—the trial court or the appellate court is "better positioned."[131] This recognition paves the way toward a unified approach to appellate review—which is further developed in Part III—that does not require an issue-specific assessment of whether that issue should be subject to either de novo or deferential review.

Recall the earlier model, which assumed that—for a particular issue—the trial court is 90% likely to be correct, but the appellate court is only 80% likely to be correct.[132] As described above, allowing de novo review would displace the trial

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129. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1474 (2017) ("[W]e reverse only when 'left with the definite and firm conviction that a mistake has been committed.'" (quoting Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985))).

130. *See, e.g.*, Horne v. Flores, 557 U.S. 433, 455–56 (2009) (finding that shortcomings in the district court's analysis in refusing to modify an injunction under FED. R. CIV. P. 60(b)(5) constituted an abuse of discretion); Koon v. United States, 518 U.S. 81, 111 (1996) (finding an abuse of discretion because the district court based its decision to depart from the Sentencing Guidelines on an improper consideration); United States v. Taylor, 487 U.S. 326, 344 (1988) (finding an abuse of discretion because the district court "failed to consider all the factors relevant to the choice of a remedy under the [Speedy Trial] Act"); Gemini Tech., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 915 (9th Cir. 2019) ("The district court did not consider Gemtech's public policy argument under factor (2) [of the governing legal framework]. This failure was an abuse of discretion.").

131. *See supra* notes 108–09 and accompanying text.

132. As mentioned above, I am aware of the shortcomings of models that assign mathematical probabilities to particular outcomes in the legal system. *See supra* note 114. They can, however, illuminate concepts that already drive the selection and application of standards of review—for example, the notions that the trial court may be "better positioned" than the appellate court to decide an issue, *see supra* notes 108–13 and accompanying text,

court's *higher* likelihood of correctness with the appellate court's *lower* likelihood of correctness—the systemic accuracy rate would be 80%.[133] It would be better to deny appellate review entirely; in that situation, the trial court's 90% accuracy rate would be the systemic accuracy rate.[134]

For deferential appellate review to make sense from an error correction standpoint, it would have to improve upon the trial court's superior accuracy rate. But is it possible to *increase* the systemic likelihood of correctness by allowing an appellate court with a lower likelihood of correctness (80%) to displace the judgment of a trial court with a higher likelihood of correctness (90%)? Yes, if the appellate court accounts for the fact that some cases may have characteristics that upset the *general* expectation regarding which court has a higher likelihood of correctness. That is, the appellate court may have a case-specific likelihood of correctness that is higher than its average likelihood of correctness. Or the trial court may have a case-specific likelihood of correctness that is lower than its average likelihood of correctness.

Focus first on variance inherent in the appellate court's likelihood of correctness. Using the example above, the appellate court's 80% average accuracy rate may include some cases where its likelihood of being correct is *more* than 80% and other cases where the likelihood is *less* than 80%. One might conceptualize the "definite and firm conviction" required to reverse under a clear-error standard as covering those cases where the appellate court believes its likelihood of correctness is higher than usual. But how much higher than usual should the appellate court's case-specific likelihood of correctness be to justify reversal under a deferential standard? Optimally, reversal should occur when the appellate court's case-specific likelihood of correctness is higher than the trial court's likelihood of correctness.

One can illustrate this point by expanding on the model above. Table 2 (below) assumes the following: In 25% of cases the appellate court is confident enough that it has a 95% likelihood of being correct. (One might think of these cases as those where the appellate court would deem it to be *clearly* erroneous to reach a contrary result.) In the remaining 75% of cases, however, the appellate court has only a 75% likelihood of being correct. On average, the appellate court has the same 80% likelihood of being correct as in the simpler model.[135] Under the standard of review proposed here, the appellate court may reverse the trial court *only* in those cases where it has the higher likelihood of being correct. The following table shows the possible outcomes:

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and that reversal under a deferential standard requires a higher level of certainty than might justify reversal under a de novo standard, *see supra* notes 122–24 and accompanying text (describing the requirement that reversal under a clear-error standard requires a "definite and firm conviction"). Assuming different hypothetical levels of accuracy is one way to explore the practical consequences of these variations. *See also infra* notes 141–44 and accompanying text (explaining why the normative insights of this quantitative model would not require courts to deploy mathematical calculations in practice).

133. *See supra* Table 1, notes 114–18 and accompanying text.

134. *See supra* Table 1, notes 114–18 and accompanying text.

135. (.95 x .25) + (.75 x .75) = .80 (or 80%).

Table 2: Deferential Standard of Review with Varying Levels of Appellate Court Accuracy

		Trial court is correct (90%)	Trial court is incorrect (10%)
25% of cases (Appellate court has high confidence; it will reverse if it disagrees)	Appellate court is correct (95%)	*Box 1: Correct result* Appellate court affirms a correct trial court decision [21.375% of all cases][136]	*Box 2: Correct result* Appellate court reverses an incorrect trial court decision [2.375% of all cases]
	Appellate court is incorrect (5%)	*Box 3: Incorrect result* Appellate court reverses a correct trial court decision [1.125% of all cases]	*Box 4: Incorrect result* Appellate court affirms an incorrect trial court decision [.125% of all cases]
75% of cases (Appellate court has lower confidence; it will affirm even if it disagrees)	Appellate court would have been correct (75%)	*Box 5: Correct result* Appellate court affirms a correct trial court decision [50.625% of all cases]	*Box 6: Incorrect result* Appellate court affirms an incorrect trial court decision [5.625% of all cases]
	Appellate court would have been incorrect (25%)	*Box 7: Correct result* Appellate court affirms a correct trial court decision [16.875% of all cases]	*Box 8: Incorrect result* Appellate court affirms an incorrect trial court decision [1.875% of all cases]

Adding these numbers, the systemic likelihood of being correct in the Table 2 scenario is 91.25%: Box 1 (21.375%) + Box 2 (2.375%) + Box 5 (50.625%) + Box 7 (16.875%). This is an improvement over both the trial court's likelihood (90%) and the appellate court's likelihood (80%) of reaching the correct result. The key gains in accuracy come in Box 2, where the appellate court is able to rely on its higher level of confidence to reverse an incorrect trial court decision, and in Box 7, where the appellate court refrains from incorrectly reversing a correct trial court decision.[137]

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136. As above, this model assumes that the trial and appellate court's accuracy rates in any given case are not correlated. Accordingly, the percentage of cases in each box is the product of all three relevant probabilities: the likelihood the appellate court will have that confidence level (high or low); the appellate court's likelihood of correctness at that confidence level; and the trial court's likelihood of correctness. For example, the percentage of cases in Box 1 is .25 x .95 x .90 = .21375 (or 21.375%).

137. As with the earlier scenario, *see supra* notes 114–18 and accompanying text, these hypothetical percentages are chosen merely to illustrate the consequences of this proposed approach to appellate review in cases where the trial court's average accuracy rate is higher than the appellate court's. Accuracy-enhancing results would also obtain with different average accuracy rates or a different distribution of accuracy levels within those averages.

Alternatively, one can model a situation where the trial court's case-specific likelihood of correctness is lower than usual. One might think of these cases as those where the trial court's decision has indicia of *incorrectness*, such as considering improper factors or failing to consider important factors. Table 3 (below) assumes that in 75% of cases, the trial court has a 95% likelihood of being correct. In the remaining 25% of cases (those where the trial court's reasoning or other aspects of the record raise a red flag), the trial court has only a 75% likelihood of being correct. On average, the trial court has the same 90% likelihood of being correct as in the earlier examples.[138] Under the approach proposed here, the appellate court may reverse the trial court *only* in those cases where it has the higher likelihood of being correct.

Table 3: Deferential Standard of Review with Varying Levels of Trial Court Accuracy

		Appellate court is correct (80%)	Appellate court is incorrect (20%)
75% of cases (Higher trial court accuracy level; appellate court will affirm even if it disagrees)	Trial court is correct (95%)	*Box 1: Correct result* Appellate court affirms a correct trial court decision [57% of all cases][139]	*Box 2: Correct result* Appellate court affirms a correct trial court decision [14.25% of all cases]
	Trial court is incorrect (5%)	*Box 3: Incorrect result* Appellate court affirms an incorrect trial court decision [3% of all cases]	*Box 4: Incorrect result* Appellate court affirms an incorrect trial court decision [.75% of all cases]
25% of cases (Lower trial court accuracy level; appellate court will reverse if it disagrees)	Trial court is correct (75%)	*Box 5: Correct result* Appellate court affirms a correct trial court decision [15% of all cases]	*Box 6: Incorrect result* Appellate court reverses a correct trial court decision [3.75% of all cases]
	Trial court is incorrect (25%)	*Box 7: Correct result* Appellate court reverses an incorrect trial court decision [5% of all cases]	*Box 8: Incorrect result* Appellate court affirms an incorrect trial court decision [1.25% of all cases]

In the top half of the Table 3, the appellate court perceives that the trial court has a higher relative likelihood of correctness (95% for the trial court, as opposed to 80% for the appellate court), so the appellate court will affirm even if it would have reached a different result under a de novo standard. In the bottom half of the table, however, the trial court has a lower case-specific likelihood of correctness (75% for

138. (.95 x .75) + (.75 x .25) = .90 (or 90%).

139. As with Table 2, the percentage of cases in each box in Table 3 is the product of the three component numbers. The percentage of cases in Box 1, for example, is .75 x .95 x .80 = .57 (or 57%).

the trial court, as opposed to 80% for the appellate court), so the appellate court will reverse if it disagrees.

Adding up these numbers, the aggregate likelihood of being correct in the Table 3 model is 91.25%—again, higher than both the appellate court's and trial court's accuracy rates.[140] The key improvements come in Box 2, where the appellate court refrains from incorrectly reversing a correct trial court decision, and in Box 7, where the appellate court correctly reverses based on the trial court's lower case-specific likelihood of correctness.

These models reveal that systemic accuracy is improved when the appellate court's decision hinges on the *relative* likelihood of error at a case-specific level. An appellate court's higher level of confidence can justify reversal even if—as a general matter—the appellate court's likelihood of correctness is lower than the trial court's. Likewise, indicia of incorrectness in the trial court—say, the trial court's consideration of improper factors in its analysis—might demonstrate that the appellate court has a higher relative likelihood of correctness in that particular case.

Within the context of the current approach to appellate review, this understanding would provide a coherent way for a deferential standard of review to operate in practice. A deferential standard of review should not be a fixed, heightened burden of reversal. Rather, deferential review should ultimately examine the relative likelihood of correctness, informed *both* by general, institutional features of the trial and appellate courts *and* by more specific features of the particular case on appeal.[141] To be clear, this inquiry would not require the appellate court to calculate with mathematical precision the accuracy rates of it and the trial court. Rather, this standard would conceptualize considerations that already inform appellate review: general institutional considerations (such as the trial court's advantage in assessing the credibility of live witness testimony);[142] the appellate court's case-specific level of confidence (how "definite and firm" its conviction is);[143] and particular strengths or weaknesses in the trial court's analysis or decision-making process.[144]

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140. The relevant numbers in Table 3 are: Box 1 (57%) + Box 2 (14.25%) + Box 5 (15%) + Box 7 (5%).

141. At times, the Supreme Court has recognized that the practical effect of a deferential standard might vary depending on how strong an advantage the trial court has given the precise circumstances of a particular case. *See* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 500 (1984) (noting that "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, but the presumption has lesser force in the former situation than in the latter") (citations omitted).

142. *See supra* notes 111–13 and accompanying text.

143. *See supra* notes 123–24 and accompanying text.

144. *See supra* note 130 and accompanying text. It would be similar, in this sense, to the preponderance-of-evidence standard that provides the typical burden of proof in civil cases. That standard is often framed in probabilistic terms: a plaintiff must "establish the probability of her claim to greater than 0.5." Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1256 (2013); *see also* John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1072 (1968) (describing "the preponderance-of-the evidence test in civil cases" as "where the jury must merely be satisfied that the probability is greater than 50 percent—in other words, that it is more likely than not that the plaintiff has a right to recover"); Harold L. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1115 (1966) (defining "'preponderance' of the evidence" to mean "probability greater than

Although this Part has developed this comparative-likelihood-of-correctness approach as a way for appellate courts to *apply* a deferential standard of appellate review under the Supreme Court's current framework, it also sheds important light on the threshold question of *whether* a deferential standard of review should apply in the first place. Current doctrine requires courts to make an abstract, front-end determination of whether trial courts are "better positioned" than appellate courts to decide a particular issue as a general matter.[145] Properly understood, however, the appellate court's application of a deferential standard should ultimately hinge on the more targeted, back-end question of whether the appellate court or the trial court is more likely to be correct *in this particular case* regarding that particular issue. That inquiry will necessarily take into account any general advantages the trial court may have. One could imagine, therefore, a unified approach to appellate review that would dispense with any ex ante choice between a de novo and deferential standard and focus instead on whether the appellate court has a higher likelihood of correctness than the trial court.[146]

III. UNIFIED APPELLATE REVIEW

This Part develops the unified approach to appellate review suggested in Part II. As illustrated above, appellate review maximizes systemic accuracy when the appellate inquiry focuses on the relative likelihood of correctness between the trial court and the appellate court in a particular case. Section A of this Part describes how this basic standard would apply in practice, highlighting its advantages over the Supreme Court's current framework. Section B responds to potential critiques of this Article's proposal. And Section C critically examines the premise that the choice between deferential and de novo review affects the amount of "energy" an appellate court must expend when deciding a particular appeal.

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fifty percent"). But a decisionmaker is not required to make a formal probability calculation. *See, e.g.*, Brown v. Bowen, 847 F.2d 342, 345–46 (7th Cir. 1988) (Easterbrook, J.) (noting that the preponderance standard requires a "greater than 0.5 [chance] that the plaintiff is in the right" but recognizing that "[l]itigation rarely produces enough information to permit the announcement of a confident probability estimate").

145. *See supra* notes 108–09 and accompanying text.

146. This same logic could apply to issues for which the *appellate court* is "better positioned" as a general matter. The Supreme Court's current approach suggests that de novo review should apply to such issues. *See supra* notes 108–09 and accompanying text. Yet that would overlook the possibility that aspects of a *particular* decision suggest *higher*-than-usual trial court accuracy. And it would overlook the possibility of *lower*-than-usual appellate accuracy; if the appellate court can have a "definite and firm conviction" to justify reversal under a deferential standard, *see supra* note 124 and accompanying text, perhaps it can have an indefinite and soft conviction that should warrant affirmance even though, in general, the appellate court might be better positioned than the trial court. This Article's approach accounts for this possibility as well, using a unified standard that looks at relative accuracy in a particular case, accounting for both generalized and case-specific considerations.

A. Implementing a Comparative Likelihood-of-Correctness Standard

As discussed above, the Supreme Court's current approach to standards of appellate review gives appellate courts de novo authority to decide all questions of law regarding a particular issue—even when a deferential standard of review applies to that issue as a general matter. That would continue to be the case under this Article's proposal.[147] Where this Article's approach departs from the current framework is with respect to non-legal questions. Instead of slotting such issues for deferential or non-deferential review at the front end, this Article develops a unified inquiry into the comparative likelihood of correctness between the appellate court and the trial court decision being reviewed.

Accordingly, in cases where the appellate court is unable to identify an error of law by the trial court, it may reverse the trial court only when its likelihood of being correct on that issue is higher than the trial court's likelihood of being correct. As explained in Part II, deference to the court with the higher *relative* likelihood of correctness maximizes systemic accuracy.[148] The overarching inquiry into which court has a higher likelihood of being correct would consider both macro questions (for example, the trial court's general advantage in assessing the credibility of live witness testimony) and micro questions (for example, the appellate court's case-specific level of confidence, or particular strengths or weaknesses in the trial court's analysis).[149] This Article's approach would not require appellate courts to make a formal, quantitative finding regarding relative accuracy rates.[150] It would simply provide a framework for assessing both generalized institutional considerations, which currently inform the *selection* of the standard of appellate review for a particular issue, and case-specific features of any given appeal.[151]

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147. Part IV proposes a workable approach to identifying what kinds of trial court errors involve questions of law that would trigger de novo appellate review. *See infra* notes 200–17 and accompanying text.

148. *See supra* Part II. Although this Article's focus is federal appellate review of federal trial court decisions, the inquiry into relative likelihood of correctness might also address concerns that arise in judicial review of agencies or, perhaps, state courts under circumstances where there is a "danger of systemic bias." Monaghan, *supra* note 20, at 239. Professor Monaghan noted that "the need to guard against systemic bias" seemed to be a justification for de novo review of some constitutional issues, *id.* at 272–73, although he questioned whether federal courts should presume such bias on the part of state courts, *see id.* at 272 ("The premise that state courts are to be suspected of distorted factfinding and law application is disquieting."). Whatever the precise institutional context, the approach proposed here could take such bias into account in assessing the relative likelihood of correctness.

149. To be clear, the appellate court would decide independently the factors that increase or decrease the likelihood of correctness with respect to any given issue.

150. *See supra* notes 142–44 and accompanying text.

151. Accordingly, the unified approach proposed in this Article would be consistent with Federal Civil Rule 52's instruction that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a)(6). The comparative-likelihood-of-correctness inquiry would provide a coherent way to understand how the "clear error" standard would apply in practice. Rule 52 reflects the notion that trial courts have a *general* institutional advantage when it comes to factual findings; but the presence of either higher-than-usual indicia of trial court error or higher-than-usual levels of

Although the initial driver for this Article's proposed approach is to optimize systemic accuracy, it will also enhance the law-clarification function of appellate courts. The appellate court may always address questions of law de novo.[152] Even beyond such legal issues, however, appellate courts will be called upon to identify conditions that increase or decrease the likelihood that a court's decision on a particular issue is correct. These would include the generalized institutional characteristics that currently inform the selection of the standard of review for particular issues. The trial court's ability to evaluate live witness testimony, for example, is a factor that increases the trial court's relative likelihood of correctness with respect to issues that hinge on the credibility of such testimony.[153] But appellate courts deploying this unified standard would also identify case-specific features of a particular decision that either increase or decrease the likelihood of correctness—and thereby provide guidance to future decisionmakers.

In essence, the price of admission an appellate court must pay to reverse the trial court is that it must articulate *why* it believes it is more likely to be correct than the trial court.[154] Even in this situation, however, the appellate court would have a choice. It could make its own, relatively more accurate decision. Or it could remand to the trial court. If, for example, the appellate court has identified weaknesses in the trial court's process or analysis, it could remand for the trial court to address those weaknesses by making a renewed assessment of the issue.

The unified standard developed here also provides a sound conceptual foundation for the prevailing "exception" for legal errors. When the trial court has made an error of law, that raises the likelihood that the trial court did not reach the correct result. Accordingly, a legal error by the trial court can justify some kind of appellate remedy. This could be an ultimate ruling by the appellate court, on the theory that its decision—which is unhampered by the trial court's legal error—is more likely to be correct. Or it could be a remand for the trial court to revisit the issue with the appellate court's legal guidance.[155]

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appellate court confidence would justify an appellate remedy under both this Article's proposal, *see supra* notes 141–46, 148–50 and accompanying text, and under the Supreme Court's current guidance regarding the "clear error" standard, *see supra* notes 122–25 and accompanying text. That this Article's unified approach applies to *all* rulings has the added benefit of making it unnecessary for courts to delineate between "[f]indings of fact" (for which deferential review is required by Rule 52) and other non-legal findings (for which the proper standard of review is currently determined using the Court's problematic framework described in Part I).

152. *See supra* notes 50–51, 147 and accompanying text.

153. *See supra* note 111 and accompanying text; *see also supra* notes 112–13 and accompanying text (describing other general advantages trial courts might have regarding particular issues).

154. Although this inquiry does not require appellate courts to declare its and the trial court's likelihoods of correctness in precise mathematical terms, it would require the appellate court to justify its assessment that it is more likely to be correct on a particular issue in a particular case, with reference to considerations that have always informed appellate review. *See supra* notes 142–44 and accompanying text.

155. In examining the legal-error exception, one might conceivably inquire into whether appellate courts are in fact "better positioned" than trial courts to decide questions of law. There are certainly strong arguments that, as a matter of institutional design, appellate courts

An additional benefit of this Article's approach is that it would encourage higher-quality trial court rulings. Trial courts would be aware that summary decisions, decisions that are not subjected to adversarial testing, or ones that are based on improper factors would come to the appellate court with a lower likelihood of correctness, increasing the appellate court's ability to reverse.[156] Conversely, trial court decisions that reflect full consideration of the relevant factors and evidence would come to the appellate court with a higher likelihood of correctness, reducing the appellate court's ability to reverse.[157] This provides a tangible benefit for careful, thorough trial court decisions—unlike de novo review, for which the trial judge knows that the appellate court has carte blanche to second-guess her regardless.[158]

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are more likely to decide legal questions correctly. *See, e.g.*, Oldfather, *supra* note 20, at 327–32 (discussing three "competence-based justifications" for de novo review of legal issues). But de novo appellate review of legal issues might also be justified by the structural ability of appellate courts to promote uniformity regarding legal questions—a federal appellate court can issue decisions that are binding precedent on all courts within its circuit, but a trial court cannot. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850–52 (1994) (describing how the obligation of inferior courts to follow higher-court precedents promotes uniformity and predictability); Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1962–63 (2017) (describing the obligation of vertical stare decisis). Perhaps for this reason, the Supreme Court's current framework does not require an issue-by-issue assessment of whether the appellate court is "better positioned" to decide a *particular* question of law—the legal-error exception applies regardless. *See supra* notes 50–51 and accompanying text. Likewise, this Article's proposal does not require a comparative-likelihood-of-correctness inquiry regarding questions of law. *See supra* note 142 and accompanying text. That said, the specialized treatment of legal issues warrants closer examination of how to distinguish questions of "law" from other issues; this Article proposes a possible solution to this puzzle in Part IV.

156. *See supra* notes 142–44 and accompanying text; *see also supra* note 130 (providing examples of reversals based on shortcomings in the trial court's reasoning); Comm'r v. Duberstein, 363 U.S. 278, 292 (1960) (reversing and remanding based in part because "the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a 'gift'" and noting that "there comes a point where findings become so sparse and conclusory as to give to revelation of what the District Court's concept of the determining facts and legal standard may be").

157. *See* Yoshino, *supra* note 20, at 281 (arguing with respect to legislative facts that "[t]rial courts should receive more deference if they use their institutional competence to conduct trials or other evidentiary hearings" and that "[i]n contrast, they should receive no deference if they simply take judicial notice of a legislative fact").

158. Similar arguments have been made regarding the appropriate role of federal habeas review of state court decisions. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor*?*, 2001 WIS. L. REV. 1493, 1519 (noting that the logical consequence of pure de novo review is that "it would not matter whether the [lower] court undertook its task carelessly, indifferently, thoroughly, or deliberately").

Accordingly, this Article's approach would play a valuable information-forcing role.[159] It would encourage trial courts to issue decisions that reveal their reasoning and analysis because the appellate court might view a poorly justified decision as less likely to be correct. And it would encourage appellate courts to identify—both as a general institutional matter and on a case-specific level—factors that increase or decrease the likelihood that a court's decision on a particular issue is correct.

More generally, this Article's approach avoids the mismatch between the practical operation of appellate review and some of the Supreme Court's justifications for selecting a deferential or de novo standard of review for particular issues. As discussed in Part I, the current approach can endow appellate courts with the power of de novo review—ostensibly because an issue involves "legal . . . work" or would require "elaborating on a broad legal standard"[160]—regardless of whether the appellate court actually engages in such legal work or law clarification when deciding a particular appeal.[161] Under this Article's unified framework, the appellate court would have to earn its ability to second-guess the trial court by *doing* that "legal work," either by identifying particular errors of law by the trial court or explaining what factors increase or decrease the likelihood of a correct result. This single template for appellate review serves the systemic goals of error correction and law clarification without the problematic step of assigning distinct standards of review to particular issues at the front end.

B. Responses to Possible Critiques

Arguments against this Article's proposal might come from opposite directions. This Section responds to potential criticisms that (1) it gives appellate courts too much power to overturn trial court decisions, and (2) it gives appellate courts too little power to overturn trial court decisions.

As for the first of these, one might argue that this Article's proposal would put too few constraints on appellate courts when reviewing trial court decisions, because it would be up to the appellate court itself to decide whether it is more likely to be correct than the trial court.[162] Although this is indeed how this Article's approach would operate, this concern is largely unavoidable given the hierarchical structure of the federal judiciary. Under the current system, even when a deferential standard of

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159. For examples of scholars exploring the capacity of legal doctrines and institutions to play an information-forcing role in other areas of law, see, e.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1264–65 (2017); Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1591 (2014) (arguing that "executive oversight and judicial review play central information-forcing roles vis-à-vis agencies"); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 904–09 (2015).

160. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

161. *See supra* notes 87–89 and accompanying text.

162. *See supra* notes 149–50 and accompanying text (describing this aspect of this Article's proposal); *see also supra* Part II (arguing that a comparative-likelihood-of-correctness inquiry improves systemic accuracy).

review applies, appellate courts decide for themselves what constitutes an "abuse of discretion";[163] they decide for themselves whether they have a sufficiently "definite and firm conviction" to justify reversal under a clear-error standard;[164] and they decide for themselves whether any "legal error" was committed that justifies reversal regardless of whether deferential or de novo review applies.[165] A court that is higher in the judicial hierarchy must ultimately police any limits that are placed upon its authority, and it may act self-interestedly (or simply make mistakes) in doing so.[166]

This Article's approach, however, provides a more significant structural check on self-aggrandizing behavior by appellate courts: reversal of a trial court's decision would always require the appellate court to provide affirmative justification. That justification could be a legal error by the trial court.[167] Or it could be an explanation of why the appellate court believes that it is more likely to be correct than the trial court.[168] By contrast, the current approach to deferential review requires little more than what Professor Maurice Rosenberg called "appellate grunting"—the appellate court may reverse even if it "does nothing by way of offering reasons or guidance for the future."[169]

An alternative line of critique might be that this Article's approach would constrain appellate courts too much. Indeed, this proposal would eliminate what might be called "pure" de novo review. There would be no situation where the appellate court can reverse the trial court based solely on the appellate court's belief that the outcome should have been different. On closer analysis, however, potential justifications for unfettered de novo review are unavailing.

First, consider the argument that pure de novo review is needed on error-correction grounds because it gives appellate courts the greatest capacity to correct trial court mistakes.[170] As described above, de novo review *reduces* accuracy in those cases where the appellate court has a lower likelihood of correctness than the trial court.[171] To insist on unfettered de novo review, therefore, would increase the likelihood of systemic error as compared to this Article's form of unified appellate review.

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163. *See* Rosenberg, *supra* note 20, at 659 (noting how "the phrase 'abuse of discretion' . . . convey[s] the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future").

164. *See supra* notes 122–25 and accompanying text (describing uncertainty regarding what constitutes "clear error").

165. *See supra* notes 50–51 and accompanying text.

166. As Justice Jackson observed about the Supreme Court (the highest appellate court in the federal system), "[w]e are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

167. *See supra* note 147 and accompanying text.

168. *See supra* notes 150–53 and accompanying text.

169. Rosenberg, *supra* note 20, at 659 ("The phrase 'abuse of discretion' does not communicate meaning. It is a form of ill-tempered appellate grunting and should be dispensed with.").

170. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 501–02 (requiring de novo review of a trial court's finding on whether a defendant made a false statement with "actual malice" in part because "the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied").

171. *See supra* Table 1, notes 114–18 and accompanying text.

A second rationale for pure de novo review might be to provide clearer guidance to lower courts on a particular issue.[172] This Article's proposal, however, gives appellate courts ample opportunity to provide such guidance. As with the current approach to all standards of appellate review, appellate courts may always provide clarification on legal questions independently, without deference to the trial court on such legal issues. Even where the appellate court is unable to identify substantive legal errors by the trial court, this Article's approach allows appellate courts to freely identify factors that either strengthen or undermine the accuracy of a judicial decision regarding that issue.[173] It would simply insist that, after making these inquiries, the appellate court should not reverse a trial court's decision unless it determines that it is more likely to be correct than the trial court. Although that standard entails some deference to the trial court, the Supreme Court itself has recognized that deferential review by appellate courts can still "narrow[]" the "channel of discretion,"[174] and "give[] substance to the notion that there are limits to that discretion."[175]

One might posit that the appellate court would provide even more guidance by reaching its own ultimate conclusion without deference to the trial court. Such guidance, however, would come at the cost of increasing the likelihood of error—as explained above. The key difference between this Article's approach and pure de novo review is that the latter would allow the appellate court to dictate a final result even where the appellate court is less likely to be correct. Essentially, the only additional guidance an unfettered de novo approach might provide would be guidance that is more likely to lead future courts toward incorrect results.

Finally, one might urge pure de novo review as a way to foster consistency or equal treatment among litigants. When selecting de novo review for certain Fourth Amendment rulings, for example, the Supreme Court majority expressed concern that a "policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause," and that "[s]uch varied results would be inconsistent with the idea of a unitary system of law."[176]

As an initial matter, this critique glosses over the process of determining whether there is, in fact, an "absence of any significant difference in the facts" of two cases.[177] If an appellate court thinks that a common set of facts must yield the same result in

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172. *See supra* notes 77–79 and accompanying text (describing the view that case-by-case de novo review by appellate courts can clarify the law in situations where legal requirements cannot be articulated with precision).

173. *See supra* notes 149–54 and accompanying text (describing this aspect of this Article's proposal).

174. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1932 (2016) (quoting Friendly, *supra* note 20, at 772).

175. *Id.* at 1934.

176. Ornelas v. United States, 517 U.S. 690, 697 (1996) (internal quotation marks omitted) (quoting Bringar v. United States, 338 U.S. 160, 171 (1949)).

177. *Id.*

both cases, it may clarify the law such that those facts compel that result.[178] This would be possible under both deferential review and this Article's uniform comparative-likelihood-of-correctness standard. Under this Article's proposal more specifically, an appellate court could identify a trial court's failure to appreciate the significance of a particular factual scenario as increasing the likelihood of an incorrect trial court decision.[179]

In any event, invoking a desire to avoid "varied results" begs the question. Deferential review by its nature tolerates variation—even, potentially, in cases that present similar factual or evidentiary records.[180] If such variation were intolerable, deferential review would never be permissible. To justify pure de novo review on the basis that it fosters consistency, therefore, requires an explanation of why consistency is valuable for its own sake—and why such consistency ought to be the dominant concern for some issues but not others.

Admittedly, scholars as far back as Aristotle have embraced the maxim that like cases should be treated alike.[181] Treating like cases alike, however, is not the same thing as treating like cases *correctly*. In other words, complying with Aristotle's maxim could well mean that two like cases are both wrongly decided.[182] That is precisely the risk that pure de novo review would create as compared to this Article's unified approach. Unfettered de novo review will increase the likelihood of an incorrect outcome—unless, as this Article's proposal would allow, the appellate court can provide reasons why it is more likely to be correct than the trial court.

Moreover, as scholars have acknowledged, to obtain genuinely equal treatment requires "substantive criteria indicating which people are equal for particular purposes and what constitutes equal treatment."[183] This Article's approach would give appellate courts plenary authority to articulate those substantive criteria, either by providing legal guidance relevant to its review of the trial court's decision,

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178. *See infra* notes 200–13 and accompanying text (describing how generalizable legal principles can instruct that the presence of a particular antecedent condition requires a particular conclusion).

179. *See supra* note 130 (describing examples where problems with the trial court's reasoning and analysis justified correction by the appellate court); *see also supra* notes 141–51 and accompanying text (describing this Article's proposed comparative-likelihood-of-correctness approach).

180. *See* Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 424 (2015) (rejecting the argument that an issue should not be subject to a jury trial because it could mean that "another jury, hearing the same case, might reach a different conclusion" and recognizing that decision-making in some disputes "necessarily requires judgment calls" even when such judgment calls "involve some degree of uncertainty").

181. *See* John E. Coons, *Consistency*, 75 CALIF. L. REV. 59, 59 & n.1 (1987) (citing ARISTOTLE, ETHICA NICOMACHEA).

182. *Cf.* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 10 (1989) ("[I]f most members of a particular group of people have been subjected to grossly unjust treatment—say, slavery or genocide—seeing that the rest of the members are subjected to the same treatment is no less wrong despite its furtherance of 'equality.'").

183. Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1169 (1983); *see also* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing that the idea of equality is simply that "people who by a rule should be treated alike should by the rule be treated alike" and that this notion is "entirely 'circular'").

identifying factors that increase or decrease the likelihood of reaching a correct result, or both.[184] Pure de novo review, by contrast, would insist on such authority even when the appellate court is unable to articulate such criteria and where the appellate court's deviation from the trial court's decision would reduce the likelihood of a correct outcome.

C. Standards of Review and Appellate Court Energy

Before moving on, it is worth mentioning one other point that has occasionally appeared in the judicial discussions of standards of appellate review: the idea that de novo appellate review is somehow more difficult—or requires more "energy"—than deferential appellate review.[185] The Supreme Court alluded to this, for example, in a decision considering the standard of appellate review for an award of attorney's fees to a plaintiff under the Equal Access to Justice Act based on the trial court's finding that the federal government's litigation position was not "substantially justified."[186] In selecting a deferential standard of review for this issue, the Court expressed concern that de novo review might require the appellate court to obtain "the district judge's full knowledge of the factual setting" and that this "acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record."[187] The Court also worried about the "investment of appellate energy" that would be required to engage in de novo review.[188]

The Supreme Court conveyed a similar notion in its recent decision on the standard of appellate review for a district court's determination of a child's "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction.[189] After holding that this issue is subject to review for clear error, the Court observed: "As a deferential standard of review, clear-error review *speeds up appeals* and thus serves the Convention's premium on expedition."[190] This is the other side of the appellate energy coin—insofar as deferential review requires less effort, the appellate court can decide appeals more quickly under a deferential standard.

In some ways, embracing this concern about the energy required for de novo review would support this Article's proposal, which argues for dispensing entirely

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184. *See supra* notes 150–54 and accompanying text.

185. *See infra* notes 6–190 and accompanying text.

186. Pierce v. Underwood, 487 U.S. 552, 554–55 (1988).

187. *Id.* at 560.

188. *Id.* at 561; *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403 (1990) (citing *Pierce*'s concern that "a de novo standard would require the courts of appeals to invest time and energy in the unproductive task"); Rita v. United States, 551 U.S. 338, 362–63 (2007) (Stevens, J., concurring) (citing *Pierce*'s observation that the "unusual expense" required to acquire "the district judge's full knowledge of the factual setting" counseled in favor of deferential review (quoting *Pierce*, 487 U.S. at 560)); *see also* United States v. McConney, 728 F.2d 1195, 1201 n.7 (9th Cir. 1984) (en banc) ("It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources than does application of the clearly erroneous standard.").

189. Monasky v. Taglieri, 140 S. Ct. 719, 727 (2020).

190. *Id.* at 730 (emphasis added).

with pure de novo review. If pure de novo review *is* more resource intensive, this Article's approach should conserve appellate court energy. That said, decisions that invoke this assumption do not explain exactly *why* deferential review is easier or quicker than de novo review. Although an empirical study of this question is well beyond the scope of this Article, the premise is far from self-evident.

It *is* fair to say that, all other things being equal, deferential review would be more likely to lead to affirmance of the lower court than non-deferential review. But it does not follow that deferential review requires less expense, energy, or effort by the appellate court. Indeed, non-deferential review might be *less* costly in one respect. For de novo review, the appellate court needs only to make an independent assessment of the issues and arguments presented. The trial court's handling of the issue is irrelevant. Deferential review, however, may require special attention to particular aspects of the trial court's reasoning, separate from and in addition to the substantive merits of the issues at stake.[191]

One possible connection between the standard of appellate review and the effort required by the appellate court may be that more energy is required when a particular case is closer to the threshold for reversal under the governing standard. In other words, it may take more effort to decide a "close case" than one where the correct disposition is more readily apparent. But even that notion does not suggest that deferential review requires less energy than non-deferential review. In a case where the appellate court can easily determine that the trial court was wrong, it can easily reverse under a de novo standard. It might require more careful scrutiny—and *more* effort—to determine whether that incorrect ruling falls on the reversible side of a clear-error or an abuse-of-discretion threshold.[192] Accordingly, the premise that de novo review necessarily requires more energy or expense than deferential review does not stand up to scrutiny.

Even if one accepted the view that de novo review requires more energy or effort than deferential review, that notion would seem to be far too blunt an instrument to drive the selection of the standard of appellate review. Consider, for example, summary judgment. A grant of summary judgment is uniformly understood to be

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191. In this sense, deferential review also imposes additional costs on the litigants, requiring them to develop an entirely new round of arguments focused on whether the trial court's decision passes muster through the lens of a standard of appellate review that no party would have had to address in the trial court proceedings.

192. To illustrate the point quantitatively (with the usual caveats, *see supra* note 114), imagine that an appellate court will reverse under a de novo standard if trial court error is more than 50% likely, and an appellate court will reverse under a deferential standard if trial court error is more than 90% likely. In a case where the likelihood of error appears to be very close to the 90% likelihood-of-error line, the appellate court could easily reverse under a de novo standard; yet the appellate court would have to invest more energy to determine on which side of the 90% line the case falls for purposes of deferential review. One scholar has made a similar point in examining the standard for video review of on-field calls by football referees. Arguing against a deferential "indisputable video evidence" standard, he observed that a "de novo standard would speed things up" in cases where a referee "promptly determines that the initial call was wrong" after video review; but with a deferential standard, additional delay and effort would be required "to mine for the shot that would seal the deal" by showing "that the incorrectness of the on-field call is indisputable." Berman, *supra* note 110, at 1705–06.

subject to de novo appellate review.[193] Summary judgment rulings come in all shapes and sizes, however. They can have dramatically different stakes, involve vastly different records in terms of complexity and volume, and entail a wide range of different claims and issues.[194]

Finally, it is incoherent—or at least incomplete—to use the selection of an issue-specific standard of appellate review to optimize resource allocation across an entire appellate docket. It is impossible to assess whether *this* issue warrants a more costly form of appellate review without comparing it to the full universe of *other* issues on that docket. And even if one could adequately undertake such an inquiry, it is far from clear that answering that question on an issue-by-issue basis is the most sensible way to allocate appellate energy most appropriately.

Not surprisingly, other efforts by appellate courts to allocate resources across their caseload have proven to be quite controversial. Courts have, for example, developed screening and tracking practices that deny oral argument or even full briefing for a large percentage of appeals, often leading to unpublished or summary dispositions.[195] Unlike the selection between de novo and deferential review,[196] these mechanisms tangibly affect the amount of "appellate energy"[197] that is required to decide

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193. *See, e.g.*, L.F. v. Lake Wash. Sch. Dist. #414, 947 F.3d 621, 625 (9th Cir. 2020); Richards v. PAR, Inc., 954 F.3d 965, 967 (7th Cir. 2020); Stoe v. Barr, 960 F.3d 627, 629 (D.C. Cir. 2020); 1077 Madison St., LLC v. Daniels, 954 F.3d 460, 463 (2d Cir. 2020). Although the Supreme Court has yet to apply its standard-of-review selection framework to this question, it has acknowledged that "on summary judgment we may examine the record de novo without relying on the lower courts' understanding." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 465 n.10 (1992).

194. The same could be said about punitive damages awards, for which the Supreme Court has applied its standard-of-review selection framework. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279–80 (1989); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431–40 (2001). Punitive damages awards can vary significantly in terms of not only the award's raw dollar amount but also the complexity of the record and issues relevant to assessing the merits of the award.

195. *See, e.g.*, McAlister, *supra* note 88, at 536 ("Traditional appellate process—including oral argument and judicial scrutiny—continues for the system's haves. But for its have-nots, the promise of an appeal as of right has become little more than a rubber stamp: 'You lose.'"); *id.* at 535–36 (noting that "[j]udicial staff attorneys . . . review and resolve appeals destined for nonpublication without significant judicial oversight" and that such unpublished decisions are "short, perfunctory," and "not safe for human consumption"); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1680 (2005) (noting case-management processes that have "abandoned the cornerstones of appellate decision-making," such as "full consideration of all issues raised on appeal, adequate oral argument and briefing opportunities, well-reasoned published dispositions, and direct involvement of Article III judges in every stage of the process"). Another plausible—if more drastic—way to allocate appellate resources would be to eliminate the right to appeal entirely in certain categories of cases. *See* Dalton, *supra* note 71, at 95–107 (considering whether certain categories of cases should be subject to discretionary appeals rather than appeals as of right).

196. *See supra* notes 191–92 and accompanying text.

197. Pierce v. Underwood, 487 U.S. 552, 561 (1988).

particular appeals. And they have been justifiably criticized for creating a "two-tiered approach to justice, with some cases receiving far less attention than others."[198]

For all these reasons, it is problematic to use the expenditure of appellate energy as a driver for selecting the standard of appellate review for particular issues. That the standard of review raises or lowers the resources required to decide a case is a questionable premise. And even if it did, an issue-by-issue inquiry is both too broad and too narrow—too broad because it presumes that all cases presenting the same issue justify the same level of resources, and too narrow because a coherent assessment of the appropriate level must necessarily compare that issue to all other issues across that court's docket.

IV. CORRALLING THE LEGAL ERROR EXCEPTION

Under both this Article's proposal and the Supreme Court's existing approach to standards of review, appellate courts always have authority to correct legal errors de novo. This exception transcends the Court's issue-specific selection framework that this Article has critiqued—it permits de novo review of legal issues *even if* deferential review is selected for a particular issue. The scope of this legal-error exception has received fairly little attention from the Supreme Court, which is somewhat surprising because it has the potential to subvert a deferential standard of review even when the Court's current selection framework requires such deference.

The rule that legal questions may be resolved de novo would likewise be a concern under this Article's approach, which leaves that legal-error exception in place. Insofar as ambiguity surrounding the legal-error exception continues under the Court's current approach, that ambiguity is not a reason to reject this Article's proposal. It is worth considering, however, whether the legal-error exception might be refined in a way that can avoid its overuse by opportunistic appellate courts.[199]

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198. Steinman, *supra* note 155, at 2007; *see also supra* note 195.

199. What constitutes a *legal* issue—especially as distinguished from a *factual* issue—is an inquiry that arises in various areas of law, and commentators have often wrestled with whether the concept is capable of a coherent definition. *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) ("The importance of the law-fact distinction is surpassed only by its mysteriousness."); Walter Wheeler Cook, *Statements of Fact in Pleading under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law.'"); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 11 (1922) (noting "the illusion that there is a clear and easily discernible difference between propositions of law and propositions of fact" and "the utter futility of the rough classification of questions as questions of law and of fact"); Monaghan, *supra* note 20, at 232 ("This distinction has long caused perplexity in such diverse areas as contracts, torts, and administrative law." (footnotes omitted)); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1304 (1942) (criticizing "[t]he naive assumption that law and fact stand naturally apart"); *see also* Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (noting "the vexing nature of the distinction between questions of fact and questions of law"); Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1005 (2d Cir. 1966) (Friendly, J.) ("The common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too simplistic . . . .").

One solution would be to define the legal-error exception to apply only to *generalizable* legal principles. More specifically, the power of de novo review under the legal-error exception would exist only with respect to propositions that can be expressed in the form "If *A* then *B*."[200] For example, if a defendant's false statement about a public figure was not made with actual malice, then the First Amendment forbids a civil defamation action based on that statement;[201] if a state uses race as the predominant factor in drawing a legislative district, then that district violates the Fourteenth Amendment unless the design withstands strict scrutiny;[202] if a defendant was under the age of eighteen when he committed a crime, then it violates the Eighth and Fourteenth Amendments to impose the death penalty for that crime;[203] if an allegation in a complaint is conclusory, then the court does not need to accept it as true in deciding whether the complaint states a claim upon which relief can be granted;[204] if an individual in custody is not "warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires," then it violates the Fifth Amendment for evidence obtained as a result of interrogation to be used against him.[205]

This approach to the legal-error exception would give effect to the understanding that, even under a deferential standard of review, the appellate court may independently determine the governing legal *standards* de novo. Justice Kagan put it well in the recent *U.S. Bank* decision, where the Court unanimously endorsed a deferential standard of review for whether someone qualifies as a non-statutory insider under bankruptcy law.[206] Despite this, Justice Kagan observed that, although the trial court "must settle on a *legal test* to determine whether someone is a non-statutory insider[,] . . . *that choice of standard really resides with the next court*: As

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200. Such if-then rules are also called conditional statements. *See* IRVING M. COPI, CARL COHEN & KENNETH MCMAHON, INTRODUCTION TO LOGIC 300 (14th ed. 2011) ("Where two statements are combined by placing the word 'if' before the first and inserting the word 'then' between them, the resulting compound statement is a conditional statement . . . ." (emphasis omitted)). Speaking somewhat more precisely, a logician would describe such a rule as: "For all cases, if *A*, then *B*." The case-specific antecedent finding (that *A* is true in particular case *n*) would be *A*n, and the case-specific conclusion (*B* is therefore true in particular case *n*) would be *B*n. *See* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1769 n.191 (2013). Such if-then statements are at the core of a syllogistic form of reasoning known as a *modus ponens*. *See* Steinman, *Case Law*, *supra* note 155, at 1971. The decisional principle (If *A*, then *B*) is the major premise of the syllogism, the antecedent finding (*A*) is the minor premise, and the conclusion (*B*) is the conclusion. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 23 (2016).

201. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

202. *See* Cooper v. Harris, 137 S. Ct. 1455, 1463–64 (2017).

203. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

204. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

205. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

206. U.S. Bank Nat'l Ass'n *ex rel.* CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 963 (2018).

all parties agree, an appellate panel reviews such a legal conclusion without the slightest deference."[207]

In *U.S. Bank*, the appellate court chose the following decisional principle: If the closeness of a creditor's relationship with the debtor is comparable to that of the enumerated insider classifications in the Bankruptcy Code *and* the relevant transaction is negotiated at less than arm's length, then the creditor qualifies as a non-statutory insider.[208] As this example illustrates, the antecedent of an if-then rule might have multiple parts. Here, the rule required both that (1) the closeness of the relationship was comparable to statutory insiders, and (2) the particular transaction was not negotiated at arm's length. Such multi-element tests are quite common,[209] and they would qualify for de novo review under the legal-error exception that exists under both the Supreme Court's current approach and this Article's proposal.

This understanding would also permit an appellate court to develop decisional principles with respect to issues that are more traditionally factual. Consider the Supreme Court's recent *Cooper v. Harris* decision, which hinged on whether North Carolina used race as the predominant factor in drawing two legislative districts.[210] Both the majority and the dissent agreed that this was a factual question subject to clear-error review.[211] The dissent, however, argued that the Court should adopt a legal principle to deal with cases where the racial identification of voters (an impermissible motivation) correlates highly with the party affiliation of voters (a permissible motivation): if racial identification correlates highly with party affiliation, then the plaintiff must submit an alternative redistricting map that could have achieved permissible political objectives without the racial effects giving rise to the racial gerrymandering allegation.[212] This sort of decisional principle could also be declared de novo under the unified framework proposed in this Article—it is a generalizable rule that can be articulated in the form "If *A* then *B*." Indeed, although the majority in *Cooper* rejected the dissent's proposed rule, it recognized this line of argument as "legal rather than factual."[213]

An appellate court might also string multiple if-then principles together by declaring what might be called subsidiary decisional principles. Consider, for

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207. *Id.* at 965 (emphasis added); *see also* Monaghan, *supra* note 20, at 235 ("The important point about law is that it yields a proposition that is *general* in character." (emphasis in original)); *id.* ("Law declaration involves 'formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms.'" (alterations in original) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374–75 (tent. ed. 1958))).

208. *U.S. Bank*, 138 S. Ct. at 965 (citing *In re* Village at Lakeridge, LLC, 814 F.3d 993, 1001 (9th Cir. 2016)). The Supreme Court itself did not endorse that rule since it had granted certiorari solely to decide the proper standard of review. *See id.* at 965–66.

209. *See, e.g.*, GARNER ET AL., *supra* note 200, at 97 (describing the reasoning of a hypothetical case as "if A, B, C, then X").

210. 137 S. Ct. 1455 (2017).

211. *Id.* at 1464–65; *id.* at 1489–91 (Alito, J., concurring in part and dissenting in part).

212. *See id.* at 1489 (Alito, J., concurring in part and dissenting in part) (citing Easley v. Cromartie, 532 U.S. 234, 258 (2001)).

213. *Id.* at 1478 (majority opinion) (describing North Carolina's argument that an alternative map was required as a "legal rather than factual attack on the District Court's finding of racial predominance").

example, a constitutional challenge to a punitive damages award. The general standard for such challenges is: if a punitive damages award is grossly excessive in relation to a State's legitimate interests in punishment and deterrence, then it violates the Due Process Clause (If *A* then *B*).[214] An appellate court might supplement this standard by declaring that a particular ratio of punitive damages to compensatory damages either is or is not grossly excessive (although the Supreme Court has not yet done so, at least not for due process purposes).[215] For example, if the ratio of punitive to compensatory damages exceeds 10:1, then the punitive damages award is grossly excessive in relation to a State's legitimate interests in punishment and deterrence (If *X*, then *A*). As long as such a proposition can be stated in generalizable, if-then form, it is the kind of decisional principle that an appellate court could declare de novo.

As these examples illustrate, if-then rules might have varying degrees of specificity. Whether a punitive damages award is "grossly excessive in relation to a State's legitimate interests in punishment and deterrence"[216] is a far less determinate inquiry than whether a punitive damages award exceeds the compensatory damages award by more than 10:1. Although a distinction is often drawn between "rules" (which are more mechanically applicable) and "standards" (which are more open-ended),[217] that distinction does not matter for purposes of this Article's proposal. The crucial question is simply whether a principle can be stated in the form "If *A* then *B*," regardless of whether the antecedent finding *A* is rule-like or standard-like.

This approach would provide a meaningful way to delineate the scope of the legal-error exception because such decisional principles are identifiably distinct from other aspects of a judicial decision. The antecedent finding *A* that plugs into the beginning of a decisional principle (If *A* then *B*) cannot *itself* be expressed as an if-then statement. *A* could be, for example: the defendant in *this* case acted with actual malice; the state used race as the predominant factor in drawing *this* legislative district; *this* transaction between this creditor and this debtor was not negotiated at arm's length; or *this* award of punitive damages is grossly excessive. This Article's approach would subject all such findings to the same unified standard of review developed above: the appellate court can reverse the trial court's antecedent finding—its choice of *A* or Not-*A*—only where the appellate court's likelihood of correctness is higher than the trial court's likelihood of correctness.[218]

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214. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

215. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). That said, the Court's due process analysis gives such ratios significant weight, *id.* ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."), and it has explicitly embraced the use of ratios for determining whether a punitive damages award is permissible under maritime law, Exxon Shipping Co. v. Baker, 554 U.S. 471, 506–07 (2008).

216. *See supra* note 214 and accompanying text.

217. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

218. *See supra* notes 141–51 and accompanying text.

V. SPECIAL CATEGORIES?

This final Part addresses special categories of rulings—which typically arise in constitutional litigation—for which the Supreme Court has suggested distinctive appellate treatment. As a general matter, this Article's proposal would subject all such rulings to the same unified template. But this Part acknowledges the possibility that some issues may present a problem of asymmetric error costs—where an erroneous decision in one direction is more costly than an erroneous decision in the other direction. The Supreme Court's current approach to selecting standards of appellate review does not consider the potential ramifications of asymmetric error costs. Under this Article's proposal, however, there are a number of ways to take such asymmetries into account. Although such modifications would constitute narrow exceptions to this Article's unified approach, they could be sensibly implemented to address circumstances where asymmetric error costs are a legitimate concern.

A. Constitutional Issues and Legislative Facts

The Supreme Court has indicated that some issues arising in constitutional litigation warrant de novo review regardless of the functional considerations that dominate its general approach to standards of appellate review. There has been considerable uncertainty and incoherence, however, regarding the precise scope and justification for such specialized treatment.

Recall that under the Court's general, functional approach to selecting the standard of review, appellate courts should apply a deferential standard of review to an issue that will "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[219] In its recent *U.S. Bank* decision,[220] the Court observed that this notion did *not* apply to mixed questions of law and fact that are relevant to *constitutional* issues: "In the constitutional realm, . . . the calculus changes. There, we have often held that the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors de novo review even when answering a mixed question primarily involves plunging into a factual record."[221]

The Court has at times endorsed this logic even with respect to more purely factual issues—ones that would seem to be squarely covered by Rule 52's instruction that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous."[222] A leading example is *Bose Corp. v. Consumer Union*, in which the Supreme Court held that appellate courts must review de novo whether the defendant in a defamation action made a false statement with "actual malice."[223]

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219. U.S. Bank Nat'l Ass'n ex rel. CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018) (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)).

220. *Id.*

221. *Id.* at 967 n.4 (alterations in original) (emphasis omitted) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503 (1984)).

222. FED. R. CIV. P. 52(a)(6).

223. 466 U.S. at 502, 514.

The Court recognized that this was fundamentally a factual question—whether the defendant made the statement with knowledge that it was false or with reckless disregard for its truth.[224] But it warranted de novo review because the presence of actual malice was a "First Amendment question[] of 'constitutional fact.'"[225]

Despite *Bose*'s potentially more generalizable reference to "questions of constitutional fact,"[226] there is no blanket rule of de novo appellate review for findings that implicate constitutional claims or defenses.[227] Earlier this year, the Supreme Court applied a deferential clearly erroneous standard to a host of trial court findings relevant to the constitutionality of Louisiana's restrictions on abortion providers.[228] And it recently confirmed that a deferential standard of appellate review applied to a trial court's finding that North Carolina used race as the predominant factor in drawing two legislative districts in violation of the Equal Protection Clause.[229]

An additional layer of uncertainty surrounding constitutional issues is whether any specialized requirement of de novo appellate review applies only *asymmetrically*. In the First Amendment context, some circuits hold that de novo review is required only when the lower court finds speech to be *unprotected* by the First Amendment, while ordinary principles of deference govern appellate review

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224. *See id.* at 502 (noting that a public official may not recover damages for a defamatory falsehood "unless he proves that the false 'statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)); *see also id.* at 498 ("It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'").

225. *Id.* at 508 n.27. How courts should treat facts underlying constitutional claims and defenses is a question that arises in other contexts as well. For example, as Professor Henry Monaghan has shown, concerns regarding "constitutional fact" review were initially raised with respect to judicial review of administrative agencies. *See* Monaghan, *supra* note 20, at 250–54.

226. *Bose*, 466 U.S. at 508 n.27.

227. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 176 & n.13 (1983) (deferring to lower court findings regarding the existence of a "unitary business" for assessing the constitutionality of a state's taxation of an entity's income and recognizing that "[t]his approach is, of course, quite different from the one we follow in certain other constitutional contexts" (citing *New York Times*, 376 U.S. at 285)).

228. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020) (Breyer, J., plurality opinion) ("We conclude, in light of the record, that the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support. None is 'clearly erroneous.'"); *id.* at 2141 (Roberts, C.J., concurring) ("In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. The District Court findings therefore bind us in this case.").

229. *See* Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017) ("[T]he court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error."); *see also* Monaghan, *supra* note 20, at 266 ("[T]he Court has declined to exercise independent judgment in the context of schools and voting. In both contexts, the Court has said that impermissible 'intent' is properly viewed as a question of fact.").

when the speaker's claim or defense is *successful* at trial.[230] Others, however, reject this view.[231] The Supreme Court has yet to consider this possibility.

Another intriguing category of findings is "legislative facts"[232] or "social facts."[233] Such facts, unlike findings that are specific to a particular case, are ones that "are utilized for informing a court's legislative judgment on questions of law and policy,"[234] or that "'transcend[] the particular dispute,' and provide[] descriptive information about the world which judges use as foundational 'building blocks' to form and apply legal rules."[235] The Supreme Court alluded to one example of such a legislative fact in a case where a defendant challenged his conviction on the basis that potential jurors who opposed the death penalty were excluded from the jury panel.[236] The federal trial court had granted habeas relief, finding that "'death qualification' produced juries that 'were more prone to convict' capital defendants than 'non-death-qualified' juries."[237] Although the Supreme Court did not resolve the standard of appellate review for such a finding, it recognized such a "legislative fact" as a category that might be subject to de novo review.[238]

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230. *See, e.g.*, Multimedia Pub. Co. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 160 (4th Cir. 1993) ("The *Bose* requirement of independent review doesn't apply to the Commission's claim that it has been wrongly prevented from restricting speech."); Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988) (stating that the court applies de novo review "[w]hen a district court holds a restriction on speech constitutional" but clear-error review "[w]hen the government challenges the district court's holding that the government has unconstitutionally restricted speech").

231. *See, e.g.*, United States v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) ("[T]his Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry."); *see also* Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981, 981 (1988) (White, J., dissenting from denial of cert.) (noting a circuit split on this issue).

232. *See, e.g.*, Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256 (2012) (citing, e.g., Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942)); FED. R. EVID. 201 advisory committee's notes subsection (a).

233. *See, e.g.*, Borgmann, *supra* note 20, at 1187 (noting that "social facts" are "commonly referred to as 'legislative' facts").

234. Davis, *supra* note 232, at 404.

235. Larsen, *supra* note 232, at 1256–57 (footnote omitted) (quoting David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991)) (quoting Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988)); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988).

236. Lockhart v. McCree, 476 U.S. 162, 165 (1986) ("Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?").

237. *Id.* at 167 (quoting Grigsby v. Mabry, 569 F. Supp. 1273, 1323 (E.D. Ark. 1983)).

238. *Id.* at 168 n.3 ("Because we do not ultimately base our decision today on the invalidity of the lower courts' 'factual' findings, we need not decide the 'standard of review' issue. We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here.").

Commentators have highlighted other examples of such legislative facts in important Supreme Court cases: whether racial segregation promotes a sense of inferiority in Black children that inhibits their learning;[239] the rates at which fleeing from the police in a vehicle causes injuries or fatalities;[240] whether violent video games cause aggression in children;[241] whether the drug midazolam is likely to render a person unable to feel pain during an execution;[242] and whether many women who obtain abortions come to regret that decision later in their lives,[243] to name a few. The Court has yet to revisit the proper standard of appellate review for legislative facts,[244] and commentators have criticized the Justices' inconsistent treatment of legislative facts in particular cases.[245]

This Article's unified approach would not treat either constitutional issues or legislative facts as separate categories subject to de novo appellate review. As with all other issues, the appellate court may reverse the trial court with respect to such issues only when the appellate court can explain why it is more likely to be correct than the trial court. It would thus resolve the inconsistencies described above. There would be no need to try to distinguish a finding like "the defendant acted with actual malice" (which is currently—at least in some sense—subject to de novo review),[246] from a finding like "the state used race as the predominant factor in drawing a legislative district" (which is currently subject to deferential review).[247] An appellate court cannot claim pure de novo review over an issue solely because of its constitutional nature,[248] or solely because one premise of the trial court's reasoning is a "legislative" fact with which the appellate court disagrees.

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239. Borgmann, *supra* note 20, at 1196 (discussing Brown v. Bd. of Educ., 347 U.S. 483, 494–95, 494 n.11 (1954)); *see also* Larsen, *supra* note 232, at 1277 (discussing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 869–77 (2007) (Breyer, J., dissenting)).

240. Larsen, *supra* note 232, at 1266 (discussing Sykes v. United States, 564 U.S. 1 (2011), *overruled on other grounds by* Johnson v. United States, 135 S. Ct. 2551 (2015)).

241. Borgmann, *supra* note 20, at 1187 (discussing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011)).

242. Yoshino, *supra* note 20, at 259 (discussing Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015)).

243. Larsen, *supra* note 232, at 1257 (discussing Gonzales v. Carhart, 550 U.S. 124, 159 (2007)).

244. *See* Borgmann, *supra* note 20, at 1188 ("The Court has not revisited the issue since *Lockhart*.").

245. *See, e.g.*, Yoshino, *supra* note 20, at 258–65.

246. *See supra* notes 223–26 and accompanying text (discussing Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984)).

247. *See supra* notes 210–13, 229 and accompanying text (discussing Cooper v. Harris, 137 S. Ct. 1455 (2017)).

248. This Article does not explore the extent to which de novo review of certain constitutional issues may be mandated by the Constitution itself. The *Bose* decision, discussed *supra* notes 223–26 and accompanying text, described its approach to appellate review of First Amendment issues as "a rule of federal constitutional law." *Bose*, 466 U.S. at 510; *see also* Monaghan, *supra* note 20, at 229 (observing that *Bose* required independent review "as a matter of 'federal constitutional law'"). Naturally, a constitutional requirement would take precedence over any judicially crafted framework for selecting standards of appellate review.

Keep in mind, however, that the appellate court could still assert de novo review with respect to legal errors.[249] So the appellate court could still independently decide the ultimate legal questions that legislative facts might inform. This may make the precise standard of appellate review for legislative facts a less important issue. In many cases, a particular legal rule does not depend completely on the existence of certain legislative or social facts; that is, a court may invoke those facts to provide rhetorical support for the legal rule, but the appellate court would have the power to adopt that rule for other reasons as well. So depriving appellate courts of de novo ability to reject a trial court's findings regarding such legislative facts might change the way appellate opinions are written but not the ultimate legal standards they declare. To the extent those underlying facts are relevant, however, the same arguments in favor of a comparative-likelihood-of-correctness standard apply with equal force to legislative facts. An appellate court should not displace a trial court's finding unless it can explain why it is more likely to be correct. Otherwise, we simply increase the likelihood that the appellate court's legal rules are based on inaccurate information.[250]

The Supreme Court's specialized treatment of constitutional issues does, however, hint at one possible rationale for applying different standards of appellate review. This rationale does not emerge from the Supreme Court's case law on this issue, or from the Court's general framework for selecting standards of appellate review. Rather, it emerges as a way to conceptualize some federal circuits' endorsement of *asymmetric* standards of review regarding certain First Amendment issues. As the next Section will discuss, issue-specific asymmetric review is one possible solution to the problem of asymmetric error *costs*.

B. Asymmetric Appellate Review

Neither the Supreme Court's basic framework for selecting standards of appellate review nor its enigmatic approach to appellate review of certain constitutional issues acknowledges the possibility of asymmetric appellate review. That is, the Court's case law does not indicate that the standard of review for a particular issue would differ depending on *which side* prevailed on that issue in the trial court. For example, when it chose the standard of appellate review for Fourth Amendment rulings,[251] it did not indicate that one standard of review applies when the trial court finds that an individual's Fourth Amendment rights *were* violated but a different standard of review applies when the trial court finds that an individual's Fourth Amendment rights *were not* violated.

There are some features of appellate practice that do operate asymmetrically, however. The Double Jeopardy Clause, for example, typically prohibits the prosecution from appealing a verdict of acquittal,[252] but there is no comparable limit on appeals by defendants convicted at trial. This sort of asymmetry may be a sensible

249. *See supra* notes 50–51, 147 and accompanying text.

250. *See supra* notes 170–84 and accompanying text.

251. *See* Ornelas v. United States, 517 U.S. 690, 695–700 (1996).

252. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 352 (1975) ("[T]he policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal.").

solution to asymmetric error *costs*. Depending on the issue, an error in one direction may be more costly than an error in the other direction. That may explain the asymmetric structure of criminal appeals: as the saying goes, "it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."[253] One could translate this maxim into economic terms: the erroneous conviction of an innocent defendant is ten times as costly as the erroneous acquittal of a guilty defendant.

Asymmetric error costs might affect the optimal approach to standards of appellate review. We may want to take special steps to avoid errors in one direction, while being more willing to tolerate errors in another direction. If an error in one direction is really ten times more costly than an error in the other direction, then perhaps appellate courts should not apply a single standard of review to a given issue—whether that standard is this Article's unified approach or the Supreme Court's current framework for choosing between deferential and de novo review.

We can illustrate this point by incorporating a simplified model of the effects of the Double Jeopardy Clause into the simplified model used earlier in this Article. As in the scenarios explored in Part II, assume that the trial court is 90% likely to be correct, but the appellate court is only 80% likely to be correct.[254] For illustrative purposes, this discussion will model the most extreme form of appellate asymmetry—a complete ban on appellate review when the trial court acquits a defendant, and de novo appellate review when the trial court convicts a defendant.[255] In cases where the trial court acquits, the result is a *correct* acquittal 90% of the time and an *incorrect* acquittal 10% of the time. In cases where the trial court convicts, we have the same set of results described in Table 1 above. Table 4 lays out these results in the context of this specific scenario:

Table 4: De Novo Review of a Trial Court Conviction

	Trial court is correct (90%)	Trial court is incorrect (10%)
Appellate court is correct (80%)	*Box 1: Correct Conviction* Appellate court affirms a correct conviction [72% of cases where the trial court convicts]	*Box 2: Correct Acquittal* Appellate court reverses an incorrect conviction [8% of cases where the trial court convicts]
Appellate court is incorrect (20%)	*Box 3: Incorrect Acquittal* Appellate court reverses a correct trial court conviction [18% of cases where the trial court convicts]	*Box 4: Incorrect Conviction* Appellate court affirms an incorrect conviction [2% of cases where the trial court convicts]

253. Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (quoting Justice William O. Douglas, *Foreword* to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11–12 (1957)); *see also* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997) (citing and quoting variations on this maxim).

254. *See supra* Table 1, notes 114–18 and accompanying text.

255. Obviously, there is a right to a jury trial in criminal cases, *see* U.S. CONST. amend. VI, but for simplicity this model assumes a bench trial.

If we assume for the sake of illustration that half of the trial court cases lead to a trial court conviction and half lead to a trial court acquittal, then the aggregate results incorporating the asymmetric approach to appellate review are as follows:

The defendant is *correctly acquitted* in *49%* of all cases. This includes 90% of the half of cases where the trial court acquits—the correct trial court acquittals that are not subject to appellate review, which are 45% of all cases (.50 x .90 = .45). And it includes, from Box 2 above, 8% of the half of cases where the trial court convicts—those where the appellate court correctly reverses an incorrect trial court conviction, which are 4% of all cases (.50 x .08 = .04).

The defendant is *incorrectly acquitted* in *14%* of all cases. This includes 10% of the half of cases where the trial court acquits—the incorrect trial court acquittals that are not subject to appellate review, which are 5% of all cases (.50 x .10 = .05). And it includes, from Box 3 above, 18% of the half of cases where the trial court convicts—those where the appellate court incorrectly reverses a correct trial court conviction, which are 9% of all cases (.50 x .18 = .09).

The defendant is *correctly convicted* in *36%* of all cases. This is, from Box 1 above, 72% of the half of cases where the trial court convicts—those where the appellate court correctly affirms a correct trial court conviction (.50 x .72 = .36).

The defendant is *incorrectly convicted* in *1%* of all cases. This is, from Box 4 above, 2% of the half of cases where the trial court convicts—those where the appellate court incorrectly affirms an incorrect trial court conviction (.50 x .02 = .01).

Combining these figures, the accuracy rate for cases that ultimately end in conviction would be *97.3%*;[256] the accuracy rate for cases that ultimately end in acquittal would be *77.8%*;[257] and the total accuracy rate across all cases would be *85%*.[258]

These *absolute* numbers do not have special significance, but when we compare them to the results in Part II, we can see the *relative* effect of this sort of asymmetric appellate review. The accuracy rate for cases that end in conviction (97.3%) is higher than the trial court's overall accuracy rate (90%). And it is higher than the optimized accuracy rate that this Article's comparative-likelihood-of-correctness approach would reach (91.25%).[259] But there would be a significant drop in the accuracy rate for cases that end in acquittal (77.8%), which is lower than even the appellate court's overall accuracy rate (80%). And the total accuracy rate of 85% is worse than what we would achieve by denying appellate review in all cases, which would yield the trial court's 90% accuracy rate. The model does reveal, however, that asymmetric appellate review is one way to address asymmetric error costs. If it were, in fact, the

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256. Under the results of this model, convictions represent 37% of all cases (36% of all cases are correct convictions and 1% are incorrect convictions). Within the universe of cases that end in conviction, 97.3% are correct (.36 ÷ .37 = .973) and 2.7% are incorrect (.01 ÷ .37 = .027).

257. Under the results of this model, acquittals represent 63% of all cases (49% of all cases are correct acquittals and 14% are incorrect acquittals). Within the universe of cases that end in acquittal, 77.8% are correct (.49 ÷ .63 = .778) and 22.2% are incorrect (.14 ÷ .63 = .222).

258. This is the sum of correct acquittals (49% of all cases) and correct convictions (36% of all cases).

259. *See supra* Table 3, note 140 and accompanying text.

case that an incorrect conviction is ten times as costly as an incorrect acquittal,[260] an economist might welcome the imbalance in accuracy rates that we see in this model.[261]

By denying appellate review of acquittals, the Double Jeopardy Clause creates an extreme form of appellate asymmetry. It would also be possible to imagine an asymmetry merely in the standards of appellate review. This is exactly what occurs in those federal circuits that embrace asymmetric review of First Amendment cases—trial court decisions that *reject* the First Amendment claim or defense are reviewed de novo, while trial court decisions that rule *in favor* of the First Amendment defense receive more deferential review.[262] One possible justification for this asymmetry could be that errors that lead to the mistaken suppression of speech contrary to the First Amendment are more costly than errors that lead to overprotection of speech. If so, de novo appellate review of, say, whether a defamation defendant acted with "actual malice" provides an additional check against that higher-cost error. As with the simplified criminal example, it can reduce the likelihood of the higher-cost error—but only at the expense of raising the likelihood of the lower-cost error.

Given that this Article's proposal is to *dispense* with issue-by-issue standards of review, it may seem odd to close with a recognition of a policy rationale *in favor* of specialized treatment of certain issues. But recognizing the misguided aspects of the Court's current approach to standards of appellate review can open space for a more coherent way to handle issues that *do* raise a threat of asymmetric error costs. Such asymmetric error costs may need a particularized solution as a check against the higher error-cost result.

There are a few ways this Article's proposal could be modified to address asymmetric error costs. One would be similar to some circuits' asymmetric review in First Amendment cases. When the trial court reaches the result with the lower cost of error (say, it rules *in favor* of the speaker in a case raising First Amendment issues), the appellate court would apply this Article's unified approach; this Article's proposal, as discussed above, has hallmarks of deferential review in that it does not permit pure de novo review.[263] But when the trial court reaches the result with the higher cost of error (say, it rules *against* the speaker in a case raising First Amendment issues), the appellate court would apply pure de novo review.

Another possible solution is to incorporate asymmetric burdens of proof for this Article's proposed inquiry into whether the appellate court is more likely to be correct than the trial court.[264] For example: If the trial court has found that a defamation defendant is *protected* from liability by the First Amendment, then the

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260. *See supra* note 253 and accompanying text.

261. Under this model, the likelihood of an incorrect conviction is about eight times *less* than the likelihood of an incorrect acquittal. *See supra* notes 256–57 (showing a 2.7% error rate for convictions and a 22.2% error rate for acquittals).

262. *See supra* note 230 and accompanying text.

263. *See supra* notes 170–84 and accompanying text (contrasting this Article's proposal with an approach that permits pure de novo review).

264. *See supra* notes 141–51 and accompanying text (describing this aspect of this Article's proposal); *see also supra* Part II (arguing that a comparative-likelihood-of-correctness inquiry maximizes systemic accuracy).

appellate court should be able to reverse only if the appellate court's likelihood of correctness is *significantly higher* than the trial court's likelihood of correctness. If the trial court has found that a defamation defendant is *not protected* by the First Amendment, then the appellate court should be able to reverse unless its likelihood of correctness is *significantly lower* than the trial court's likelihood of correctness. This Article's unified approach would be the presumptive foundation for appellate review, but issue-specific heightened burdens could be deployed—if necessary—to address asymmetric error costs.

That said, introducing asymmetries into the appellate process is not the only way to address asymmetric error costs. For example, we might simply insist on higher burdens of proof *at trial* with respect to a particular high-error-cost outcome.[265] *Evidentiary* requirements might also be crafted with an eye toward reducing the likelihood of higher-cost errors.[266] The existence of such trial-level adjustments could make appellate-level adjustments unnecessary; the unified approach to appellate review proposed in this Article would permit appellate courts to optimally assess the likelihood that such asymmetric error-reducing requirements were implemented correctly by the trial court.

Even if one recognizes a need for specialized appellate treatment of certain issues to account for asymmetric error costs, such exceptions would presumably be quite narrow. That the Supreme Court has never considered such asymmetric error costs in connection with its current approach to selecting and applying standards of appellate review suggests that asymmetric review would be warranted only in the rarest of circumstances. If such a situation were to arise, however, this Article's framework would be able to account for such concerns.

CONCLUSION

The standard of appellate review is a threshold question in every appeal. Given the crucial role that appellate courts play in our judicial system, having a coherent approach to standards of appellate review is imperative. Although the Supreme Court has frequently intervened to determine what standard of review should govern particular trial court rulings, its framework for choosing between de novo and deferential review is fundamentally flawed.

The key goals of appellate review—error correction and law clarification—are better served by a uniform template that permits reversal only when (a) the trial court committed an error of law or (b) the appellate court's likelihood of reaching the correct decision is higher than the trial court's. This proposal would eliminate the problematic inquiry into which standard of review should govern which trial court rulings. Yet, it also minimizes the systemic likelihood of judicial error and enhances

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265. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (holding that a criminal conviction requires "proof *beyond a reasonable doubt* of every fact necessary to constitute the crime" (emphasis added)); Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) ("When, as here, the plaintiff is a public figure, he cannot recover unless he proves by *clear and convincing evidence* that the defendant published the defamatory statement with actual malice." (emphasis added)).

266. *See, e.g.*, U.S. CONST., art. III § 3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

the important role that appellate courts play in clarifying the law's substantive content.